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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. V.

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VOL. V.

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AMERICAN STATE REPORTS.
VOL. V.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

STONE v. DAY.

[69 TEXAS, 13.]

PLEADING. — ALL REASONABLE INTENDMENTS WILL BE INDULGED IN FAVOR OF PLEADING EXCEPTED TO, when the exceptions, though special in form, are but an amplification of the general demurrer, and fail to point out specific defects.

EXECUTION SALE — FRAUD INVALIDATING. — Where the sheriff levies upon property in violation of law, induced thereto by one who becomes the purchaser at the execution sale, at a grossly inadequate price, the sale thus procured is illegal, and, as to such purchaser, may be avoided by the judgment debtor.

ID. — PARTIES TO PROCEEDING TO SET ASIDE EXECUTION SALE. — Where, in proceeding to set aside execution sale procured by fraud of purchaser, no complaint is made as to the validity of either judgment or execution, and there are no equities to adjust between the execution creditors and the original purchaser against whom relief is sought, the plaintiff in execution is not a necessary party, and the proceeding is in no sense collateral in character.

ID. — EVIDENCE, RELEVANCY OF. — When, on the trial of an action, the issue is whether the apparent purchaser of the property in controversy really purchased it with his own money, any testimony tending directly to show that he had no money of his own, or not enough to have made the purchase, is admissible; and in this connection, it may be shown whether he was engaged in any business at or before the time of the purchase, whether he was frugal or prodigal in his expenditures, and whether he was industrious or indolent in his habits; but evidence that he habitually visited saloons and houses of ill-fame is too remote, and being calculated to prejudice the jury, should be excluded.

SUIT commenced by A. Day, appellee, against I. Stone, Rosa, Sarah, and Zatie Stone, appellants, to try title to three

lots, and to recover possession thereof, with rents and damages. Verdict and judgment were for the appellee for the land, and for \$1,238.50 for his damages; and the appellants prosecuted this appeal. The appellee's petition alleged that, on December 15, 1877, appellant I. Stone bought the land in controversy from Lorange for two hundred dollars, and that at the time of the purchase he was largely in debt, and not owning enough property to pay his debts; that prior to this time, Edward and John Martin recovered a judgment against said Stone for \$405 and costs, and that afterwards A. Day and Son recovered a judgment for \$5.32 and costs; that said lots were levied on by virtue of executions issued under said judgments, and the lots were regularly sold by the proper officers on September 3, 1878, and were bid off by appellee, he paying eighty dollars under the Martin execution and twelve dollars under the execution of A. Day and Son, and received deeds respectively from the sheriff and constable who made the sales; that the purchase of the lots was made and the purchase-money paid by I. Stone, with intent to hinder, delay, and defraud his creditors, and to conceal and cover up his title to the property he induced Lorange to execute the deed to the lots to Simon Stone, his brother, and thereafter, December 24, 1877, with the fraudulent intent aforesaid, he caused the said Simon to execute a deed, upon the recited consideration of love and affection, to the said I. Stone, to the lots in controversy, for the use of the appellants Rosa, Sarah, and Zatie Stone, children of the said I. Stone; that he recorded said deed, and went immediately into possession, made valuable improvements, and had since held possession, collected rents, etc.; and that said Simon never paid or received any consideration for the lots, and that the rental value of said property was thirty dollars per month. Appellants pleaded the general denial, and specially that Simon Stone purchased the said lots with his own money; that he was unmarried, and the uncle of Rosa, Sarah, and Zatie, and strongly attached to them, and for that reason conveyed the lots to I. Stone in trust for their use; that at the time of making the levies under which the lots were sold, the said I. Stone lived at Cleburne, Johnson County, and owned and possessed in his own right, free from encumbrance, subject to execution, personal property more than sufficient to have paid both of the said judgments of the Martins and of Day and Son, which fact was well known to the appellee, A. Day, and to Davis,

attorney for the Martins; that no demand was made on I. Stone for payment by the officers having said execution, nor to point out property on which a levy might be made; that their failure to do so was at the special instance of the appellee and Davis, attorney for the Martins, with the fraudulent intent of overreaching and defrauding appellants; that the land in controversy was divided into three separate and distinct lots, with improvements on each, and all of the aggregate value of \$2,250, which facts were well known to appellee and said Davis at the time of said levies, and that, well knowing all these facts, appellee induced said levies to be made on all of said lots, for the purpose of defrauding and oppressing the said I. Stone; that after said levies, appellant went to said officers, and proposed to point out personal property in Johnson County, unencumbered and subject to execution, and to which he had good title, more than sufficient to pay said execution; that this offer was well known to the appellee before the sale under said execution, but with intent to defraud appellants the said appellee induced said officers to refuse to levy on said personal property; that said levies and the sales under them were illegal and void, and appellants tendered into court the purchase price paid by appellee, and interest from date of payment; and that said lands were sold under said execution sales at a price grossly disproportionate to and below its true value. To this answer appellee demurred, setting out, in substance, the following grounds: 1. If the lots were not the property of I. Stone, or bought with his money, the levy could not be fraudulent as to him; 2. Because the other appellants not being parties to either execution, neither the alleged fraudulent conduct of the plaintiffs in execution and the officers, nor the levy or sale of the property, could affect them in any way; 3. Because the alleged fraudulent conduct of appellee and said officers amounts to irregularities only, which cannot be reached except by direct suit against officers and all parties plaintiff in execution, and cannot be taken advantage of in a collateral proceeding, as herein attempted, the plaintiffs in execution not being parties to this suit; 4. Because it is not averred that I. Stone was not present at the sale, or that there was any unfairness in the sale, or that Stone made any request, either at or before the sale, that the lots be sold separately. These exceptions were sustained, the answer was stricken out, and the appellants assigned error.

James W. Brown and W. F. Ramsey, for the appellants.

L. B. Davis and D. T. Bledsoe, for the appellee.

MALTBIE, J. It will be observed that appellee's exceptions are but little more than an amplification of the general demurrer, and that he does not except to appellant's special answer on account of defective statements or want of fullness in the allegations, and hence all reasonable intendments will be indulged in favor of the pleading. Although the personal property alleged by I. Stone to be in Johnson County is not described nor its value stated, except in comparison with the amount due on the executions, yet these allegations are believed to be good under the exceptions urged, and the question is fairly presented whether the facts stated, giving to them their full force and effect, are sufficient to avoid the sheriff's sale under which appellee claims title to the land. The jury having found that the property belonged to I. Stone, so far as the present trial is concerned it will not be necessary to notice the first nor second exceptions.

The third exception seeks to avoid the force of appellant's answer, on the ground that this is a collateral proceeding, and the plaintiffs in execution are not parties, and that the conduct of the appellee and officers complained about were mere irregularities. There is no complaint as to the validity of either judgment or execution, and therefore the plaintiffs in execution are not necessary parties; there being no equities to adjust between the purchaser and execution creditors, and this being a proceeding by the owner of the land against the original purchaser at the execution sales to set them aside, is in no sense a collateral proceeding.

It is complained that the appellee, who was the purchaser of the land at the execution sale, combined and confederated with the officers whose duty it was to make the levy and sale, to violate the laws passed for their direction in making such sales, and that the land sold brought only one twenty-second part of its value. It is not alleged that the conduct of appellee contributed to the grossly inadequate price for which the lots were sold. But it is alleged that the combination and confederation between appellee and the officers was for the purpose and with the intent to oppress and defraud I. Stone; and through the agency of appellee and the attorney of the other plaintiffs in execution, the officers were induced to forego levying on personal property, as the law commanded them to

do, before touching the improved real estate, and to levy on the lots; and that the disastrous consequence was, that the property sold at less than one twentieth of its value, and that appellee was the gainer to that extent by his positive frauds, if the answer is to be taken as true. The precise question involved has not been decided in this state; but in a motion for rehearing, in the case of *Odle v. Frost*, 59 Tex. 689, Chief Justice Willie uses the following language:—

“As to the failure of the sheriff to demand a levy of appellant before proceeding to sell the land, this court has held the statute in such respects directory, and that the failure to comply with its requirements would not necessarily render the sale void. If it be shown that the failure is the result of a fraudulent combination between the sheriff and plaintiff in execution, the result might be different.” But no such facts were shown, or attempted to be shown, in that case.

It has been held in Kentucky that, where a sheriff had failed to give proper notice of an execution sale, and a person cognizant of the fact induced the officer to sell, and became the purchaser, such conduct of the sheriff was illegal, and the purchaser being *particeps criminis* the sale was illegal and void for fraud, and will be set aside: *Hayden v. Dunlop*, 3 Bibb, 216.

Here the appellee is alleged to have induced the officers to violate the law in levying upon the property, and to have become the purchaser at the sale, at a grossly inadequate price; and we are of the opinion that a sale thus procured is illegal, contrary to public policy, and may be avoided, as to the purchaser, at such sale. It follows that there was error in sustaining the exceptions to appellant's special answer.

Appellee seeks to sustain the ruling of the court, upon the ground that the uncontradicted testimony in the case, as he alleges, shows the answer of appellants to be false. In sustaining the exceptions, the district court, in effect, notified appellants that the facts alleged in their answer was no defense to the action, and that no evidence would be heard in support of their allegations; and now appellee, at whose instance said answer was stricken out, ought not to be heard to say that the allegations in the answer are proven to be false, appellants not having had an opportunity to establish the truth of the same before the jury that tried the case.

During the progress of the trial, one of the issues being whether Simon Stone purchased the lots in question with his

own money, a witness for appellee was permitted to state, over appellant's objections, that Simon Stone was dissipated in his habits, and an habitual frequenter of saloons and houses of ill-fame, which is assigned as error. Any testimony directly tending to show that Simon Stone had no money, or not enough to have purchased the property in controversy, would have been admissible, though it might have prejudiced the jury against appellants; and in this connection, it would have been competent to have shown whether he owned any property, or was seen with money at or before the time of the purchase; whether he was engaged in any business; whether frugal or prodigal in his expenditure; and whether he was industrious or indolent in his habits; whether there were judgments or executions against him, and other facts of like character having a tendency to elucidate the issue: Abbott's Trial Evidence, p. 616, secs. 5, 6.

The evidence objected to was in reference to the personal habits of Simon Stone, in directions where a good deal of money is supposed to be squandered, but not tending to show that he was of extravagant habits, or if so, the tendency would be remote; and being calculated to prejudice the minds of the jury, should, in our opinion, have been excluded.

Other errors are assigned, but not in such a manner as to require notice. For the errors considered, we report that the case ought to be reversed and remanded.

OBJECTION OF WANT OF PARTICULARITY IN STATEMENT OF CAUSE OF ACTION is not raised by general demurrer: *George v. Thomas*, 67 Am. Dec. 612; and see *Cunningham v. Smith*, 60 Id. 333; *Coffin v. Knott*, 52 Id. 537.

INADEQUACY OF PRICE, effect of on execution sale: *Campon v. Godfrey*, 100 Am. Dec. 133, and note 146; *Carden v. Lane*, 3 Am. St. Rep. 228.

PURCHASER'S TITLE UNDER EXECUTION, WHEN PROTECTED: *Corwith v. State Bank*, 86 Am. Dec. 763; *Dodge v. Walley*, 83 Id. 61; *Sydnor v. Roberts*, 65 Id. 84; *Durham v. Heaton*, 81 Id. 591; his title to land cannot be affected by the sheriff's failure to seize personal property upon which he might have levied: *Sydnor v. Roberts*, 65 Id. 84.

FRAUDULENT PURCHASER OF LAND AT SHERIFF'S SALE may be treated as trustee by those interested in the property: *Bethel v. Sharp*, 76 Am. Dec. 790.

JUDICIAL SALE, GROUNDS FOR SETTING ASIDE: *Campbell v. Gardner*, 69 Am. Dec. 598, and note 604.

SOLVENCY CANNOT BE SHOWN BY PROVING CHARACTER FOR HONESTY, and by showing that the party always paid his debts: *Janes v. Scott*, 98 Am. Dec. 328.

WEINSTEIN v. NATIONAL BANK OF JEFFERSON.

[69 TEXAS, 38.]

PLEADING AND PRACTICE — PLEA OF ESTOPPEL. — In a suit by a depositor against a bank to recover an amount paid by the bank on forged checks drawn in the depositor's name, a plea alleging that the plaintiff, having received his pass-book and checks, and having failed to detect and denounce the forgeries within a reasonable time, was thereby estopped from questioning the correctness of the account, is bad, inasmuch as it fails to allege or show any injury or loss to the defendant occasioned by or resulting from such delay.

ID. — IN ACTION AGAINST BANK TO RECOVER AMOUNT PAID ON FORGED CHECKS, a plea by way of estoppel, averring that by reason of "the negligence and failure" of the plaintiff to examine the account and report any errors or forgeries therein, the defendant was "debarred the right and opportunity of protecting itself," is good on general demurrer. But a special exception on account of vagueness and generality, if filed, should be sustained.

ESTOPPEL. — ESTOPPEL MAY BE CREATED NOT ONLY WHEN PARTY SOUGHT TO BE CONCLUDED KNOWS the material facts he is charged with having represented or concealed, but also when he is in such position that he ought to have known them, so that knowledge will be imputed to him.

ID. — WHEN ONE PARTY HAS BEEN PREVENTED, BY CONDUCT AND REPRESENTATIONS OF ANOTHER, from taking prompt action for the collection of his debt, this is such a change in his position for the worse as to meet the requirement of the law in creating an estoppel.

BANKS AND BANKING. — IT IS DUTY OF DEPOSITOR TO KNOW WHETHER HIS ACCOUNT WITH BANK IS CORRECT OR NOT, and promptly to report a forgery when detected; and if he negligently fails to make the examination and consequent discovery when he could have done so, it is as if he had expressly admitted the genuineness of the checks, and he will not be permitted to deny the fact, provided the bank be prejudiced by the failure.

ID. — BANK IS NOT LIABLE TO DEPOSITOR FOR MONEY PAID ON FORGED CHECKS, where, by reason of the depositor's negligence and delay in examining his account and reporting the forgeries, the bank loses the opportunity of recovering the money which it would have had if the discovery and report had been made in a reasonable time.

ACTION to recover money paid by a bank on forged checks.
The facts are stated in the opinion.

Todd and Hudgins, for the appellant.

C. A. Culberson, for the appellee.

GAINES, J. The plaintiff in the court below, who is appellant here, was, during the years 1885 and 1886, a merchant in the city of Jefferson and depositor in the bank of the defendant corporation. He was absent during the period of the transactions involved in this suit, that is to say, from December, 1885, to August, 1886, but his business was in charge of

his brother, A. Weinstein, who was his agent and attorney in fact. On the 27th of February and also on the 12th of June, 1886, the cashier of the bank balanced plaintiff's pass-book, and returned all checks, which had been paid by the bank up to these dates respectively. In August, 1886, A. Weinstein discovered, or claimed to have discovered, that a number of checks of dates extending from December 5, 1885, to June 4, 1886, which had been paid by the bank and charged to plaintiff's account, had been forged. The aggregate amount was \$1,082.05. The checks were embraced in the accounts balanced in the pass-book, and were returned to plaintiff's agent with the pass-book when balanced at the dates named above.

Plaintiff made demand of the bank for the money charged against him on the checks alleged to have been forged, and payment having been refused, brought this suit for its recovery. The defendant pleaded a general denial, and also in substance that plaintiff's agent having, at the dates above named, received the pass-book and checks, and having failed to use due diligence to detect and denounce the forgeries within a reasonable time, plaintiff was thereby estopped from questioning the correctness of the account. The court overruled an exception to the plea of estoppel, and plaintiff excepted to the ruling, and now assigns it as error. The ground of the exception was, that the plea did not "allege or show any injury or loss to defendant occasioned by or resulting from the delay on part of plaintiff," in discovering and giving notice of the forgeries. The exceptions were well taken to the original answer. It contained no averment of any loss by reason of the laches of plaintiff's agent, or that its condition had been in any manner changed for the worse by his negligence. We do not see that such loss or injury was a necessary consequence of the facts set forth in the answer, and hence, in our opinion, in order to make it good as a plea of estoppel, it should have been alleged. But in a trial amendment filed by leave of the court (it is to be presumed after the exceptions had been sustained, though no order sustaining it appears on the record), defendant avers that by reason of the "negligence and failure" to examine and report any errors or forgeries therein it was "debarred the right and opportunity of protecting itself"; and further, that if the account of February 27th had been examined and the forgeries reported, defendant would not have paid the other checks alleged to have been forged. The first part of this allegation is vague

and indefinite, but we think it good upon a general demurrer: *May v. Taylor*, 22 Tex. 348; *George v. Lemon*, 19 Id. 151. A special exception on account of vagueness and generality should have been sustained, but no such exception was filed.

Appellant's second assignment is that, — "2. The court erred in its charge to the jury in paragraphs 9, 10, and 11 of said charge, in this, that said instructions debarred plaintiff from any recovery for any amount, notwithstanding all the checks may have been forged, if the jury found a failure on the part of plaintiff to examine and inspect the accounts and checks, which were never returned to him until February 27, 1886."

We do not think the assignment well taken. It may be that these paragraphs, if they stood alone, would subject the charge to the criticism which is made upon it. In paragraph 9 the jury are told that if, by reason of the failure of A. Weinstein to examine the account and report the forgeries "the opportunity of protection on part of defendant was lost, then plaintiff would not be entitled to recover." The eleventh paragraph contains substantially the same proposition. We are not prepared to say that, under the peculiar facts of the case, these paragraphs of the instructions, taken by themselves, would not have been calculated to mislead; but in the sixth paragraph the jury had been previously instructed, in effect, that the bank would be liable, unless Weinstein had neglected to examine the account and report the forgeries "for such a length of time as worked an injury to the bank"; and in the seventh they are further charged, in effect, that the bank was injured if, by reason of Weinstein's negligence and delay, it lost the means of recovering the money, which it would have had if the discovery and report had been made in a reasonable time. Taking the charge as a whole, the jury must have understood that they were not warranted in finding for the plaintiff under any state of facts, unless they found that the bank had not been prejudiced by the negligence of plaintiff's agent.

In his third assignment of error, appellant complains of the action of the court in refusing to give the following instruction asked by his counsel upon the trial: "If you believe, from the evidence, that the defendant paid the checks purporting to be drawn by the plaintiff between the fifth day of December, 1885, and the twenty-seventh day of February, 1886, the date of the balancing and return of plaintiff's book, and if you believe that any of such checks so paid within said

period of time were false or forged, then the plaintiff is not estopped from recovering the amount so paid on such false or forged checks and charged to plaintiff, even though you should find that plaintiff is estopped by negligence from recovering for any forged or false checks paid after said balancing and return of said pass-book on said February 27, 1886. And in such case you will find for plaintiff the amount of such false and forged checks so paid by defendant and charged to plaintiff from December 5, 1885, to February 27, 1886."

It will be seen that the charge requested and refused assumes, as a matter of law, that there could be no estoppel as to the amounts paid on the checks alleged to be forged before the balancing of the pass-book and the return of the checks on the 27th of February, 1886; and appellant is not without authority to support this position. In Daniels on Negotiable Instruments it is said: "It seems, further, that the depositor owes the bank no duty which requires him to examine his pass-book or vouchers with a view to detection of forgeries of his name, and may therefore repudiate such a charge whenever the forgery is discovered": 2 Daniels on Negotiable Instruments, sec. 1370. The learned author refers, in support of his position, to *Weisser v. Dennison*, 10 N. Y. 69, 61 Am. Dec. 731, and to *National Bank v. Tappan*, 6 Kan. 465, the former of which fairly supports his text, though in our opinion the latter does not. We think there may be cases in which a bank that has paid forged checks may be put in a worse position by the failure of the depositor to detect the forgery upon return of his pass-book within a reasonable time than he would have been had the fraud been promptly discovered and denounced. In such a case, injury having resulted, the transaction contains every element of an estoppel. The object of the statement of the account in the pass-book and its return with the checks is to apprise the depositor of the full state of his account, as shown by the books of the bank, to the end that he may verify it if it be correct, or detect its errors if it be found erroneous. The banker impliedly says to the depositor: This is my account; examine it, and if not found correct, report to me its inaccuracies. And should the latter fail to complain within a reasonable time, the banker would have the right to consider that there was no objection to it. By his failure to speak in proper time, he virtually admits the correctness of the items charged. It is now held that an estoppel may be executed, not only when the party sought to be concluded knows the material facts he

is charged with having represented or concealed, but also when he is "in such position that he ought to have known them, so that knowledge will be imputed to him": 2 Pomeroy's Eq. Jur., sec. 809. Hence it is the duty of the depositor to know whether the account is correct or not, and promptly to report a forgery when detected. Should he negligently fail to make the examination and consequent discovery (when he could have discovered it), it is as if he had expressly admitted the genuineness of the checks, and he will not be permitted to deny the fact, provided the bank be prejudiced by his failure. It has been held by this court, when one party has been prevented or induced by the conduct and representations of another from taking prompt action for the collection of his debt, that this is such a change in his position for the worse as to meet the requirement of the law in order to create an estoppel: *Schwarz v. National Bank*, 67 Tex. 217.

In these views we are ably sustained by the opinion in the case of *Leather Manufacturer's Bank v. Morgan*, 117 U. S. 96. That case, as to its facts, is very similar to the case before us, and in the opinion there delivered, Mr. Justice Harlan exhaustively reviews the authorities, and affirms the principles we have stated. The learned judge distinguishes the cases of *Wiesser v. Dennison*, and *National Bank v. Tappan*, *supra*, and claims that they are not in conflict with his opinion. We need refer only to that opinion in support of our conclusion and to the cases there cited and discussed. There are expressions in the language of the court in that case, from which it may be inferred that the law would presume that the bank was prejudiced by the negligence of the depositor in failing to detect and discover the forgery. We are not prepared to say whether such a deduction may be legitimately drawn from it or not, but if so, we do not wish to be considered as assenting to that doctrine. We think that it is a matter for the jury under appropriate instructions from the court.

By the charge under consideration, appellant virtually requested the court to instruct the jury that the bank could not have been prejudiced, and would at all events be liable, as to the checks paid before the first return of the pass-book and checks in February, 1886. It follows, from what we have said, that in our opinion this is not the law, and there was no error in refusing to give the instruction. The general charge left it to the jury to say whether the bank was injured or not, and this was correct. There is no assignment raising the

question of the sufficiency of the evidence upon that issue, and therefore we are not called upon to consider whether or not the evidence supports the verdict in that particular.

There is no error, and the judgment is affirmed.

Affirmed.

BANK PAYS FORGED CHECK AT ITS PERIL: *First Nat. Bank v. State Bank*, 3 Am. St. Rep. 294, and cases collected in note 298.

DEPOSITOR IS NOT ESTOPPED from proving that checks returned by the bank as paid were forgeries, by reason of his neglect to examine them when returned: *Weisser v. Dennison*, 61 Am. Dec. 731, and note.

TO CREATE AN EQUITABLE ESTOPPEL, the party sought to be estopped must have done some act or made some admission to influence the conduct of the other, which act or admission had been acted upon by the latter, and which would be inconsistent with the claim on the part of the former: *New York Rubber Co. v. Rothery*, 1 Am. St. Rep. 822, and note; or the contradiction of which would operate as a fraud upon the party who had acted upon it: *Humphreys v. Finch*, 2 Id. 293, and note. And ignorance will not excuse the party making the representations, if he is in such a position that he could have ascertained or ought to know the truth: *Titus v. Moore*, 63 Am. Dec. 665; *Maple v. Kussart*, 91 Id. 214.

ESTOPPEL IN PAIS SHOULD BE PLEADED with same fullness and particularity as is required in cases involving like subjects of inquiry in suits in equity; but if evidence of the facts constituting it be admitted without objection, the defect in pleading is waived: *Davis v. Davis*, 85 Am. Dec. 157. Estoppel need not be pleaded under Minnesota code, in order that it may be given in evidence: *Caldwell v. Auger*, 77 Id. 515.

KOHNS V. WASHER.

[69 TEXAS, 67.]

AFFIDAVITS. — IT IS SUFFICIENT COMPLIANCE WITH STATUTORY PROVISION that all affidavits "shall be in writing, and signed by the party making the same," that the signature of the affiant, instead of being affixed below the body of the affidavit, and above the jurat, appears below the official signature of the notary.

ATTORNEY AS SURETY. — RULE OF COURT IN TEXAS, providing that "no attorney or other officer of the court shall be surety in any cause pending in court, except under special leave of the court," is merely directory; and if such officer or attorney become a surety in contravention of the rule, his act is neither void nor voidable. The purpose of the regulation is sufficiently accomplished by punishing the offender for contempt of court, without holding the bond a nullity.

ACTION to recover the value of certain merchandise. The facts appear in the opinion.

Wray and Standley, for the appellants.

Ball and McCart, A. M. Carter, and R. M. Wynne, for the appellees.

GAINES, J. Appellants brought this suit to recover of appellees the sum of \$1,630, the alleged value of certain merchandise averred to belong to plaintiffs, and to have been converted by defendants. The petition alleged that plaintiffs were citizens and residents of the state of Illinois, and that defendants were residents of Tarrant County, and citizens of the state of Texas. On the fourteenth day of September, 1885, the plaintiffs filed a petition for removal of the cause to the United States circuit court for the northern district of Texas, under subdivision 3 of section 639 of the Revised Statutes of the United States. The petition was accompanied by an affidavit and bond, to which, on the 13th of September, defendants filed exceptions in due form. The court thereupon sustained the exceptions to the bond, and refused the application for the removal of the cause, to which ruling plaintiffs excepted. The cause, having proceeded to trial, resulted in a verdict and judgment for the defendants.

The plaintiffs now appealing assign as error the action of the court in refusing to remove the cause. Appellees insist that both the bond and affidavit were insufficient, and upon the determination of the question of their validity the decision of the case in this court depends.

The ground of the exception to the affidavit is, that the signature of the affiant, David A. Kohn, instead of being affixed below the body of the affidavit, and above the jurat, appears below the official signature of the notary. Waiving the question whether a common-law affidavit is not all that can be required under the act of Congress, we are of opinion that the affidavit in controversy must be held good under our own laws. The statute provides that all affidavits "shall be in writing, and signed by the party making the same": R. S., art. 6. As to the place of the signature, nothing is said. The jurat is in these words: "Subscribed by the said David A. Kohn, and by him sworn to before me this, the thirty-first day of August, A. D. 1885." The signature, "David A. Kohn," appearing immediately below the official designation of the notary, it is apparent that it was placed there by the affiant for the purpose of subscribing to the instrument. This meets fully the objects of the law, and is all that can be required.

The objection to the bond is, first, because it is signed by plaintiff's attorneys as sureties, without first having obtained leave of the court; and second, because the sureties were, as alleged, insolvent. The judgment of the court upon the exceptions to the bond shows that they were sustained upon the first ground, and nothing being said as to the second, we are to presume that the objection was waived, or that upon a hearing of the evidence the sureties were held to be solvent.

The question whether a bond made in course of a judicial proceeding in the courts of our state, and signed by an attorney as a surety in violation of the rules of the court, can be held valid when objected to, is not without difficulty. The great weight of authority is, that if it is received and acted upon without exception being made to it, it will be held good. Such seems to be the uniform ruling of the court of king's bench: *King v. Sheriff of Surrey*, 2 East, 182; *Foxhall v. Bowerman*, Id.; *Hooper v. Tahomdon*, 1 Chit. 714, note; though a different rule appears to have prevailed in the common pleas: *Cokish v. Ross*, 1 Taunt. 164. But we have found but one decision in the courts of this country in which such a bond is held absolutely void (*Cothren v. Connaughton*, 24 Wis. 134); and in that, the court, speaking of the statute incapacitating attorneys from becoming sureties, say: "This statute does in terms deprive attorneys practicing in any of the courts of this state of the legal power or ability of becoming a surety on any undertaking, and this is not a personal privilege which the attorney may waive, but the law evidently intends to disqualify them from entering into such contracts." From this we infer that the language of the Wisconsin statute differs materially from the language of the statutes of other states, and their rules of court upon the same subject. In Kentucky they have a statute prohibiting any officer from taking any attorney as a surety on a bail bond; yet, for the reason that it does not declare a bond with such surety void, the court say it is merely directory, and hold that the surety, though an attorney, is bound: *Holandsworth v. Commonwealth*, 11 Bush, 617. Such is also the construction placed upon statutes of similar import in Ohio, Illinois, Missouri, and Kansas: *Sherman v. State*, 4 Kan. 570; *Hicks v. Chouteau*, 12 Mo. 342; *Wallace v. Scoles*, 6 Ohio, 429; *Jack v. People*, 19 Ill. 58.

We have no statute upon this subject which applies to proceedings in civil cases. Our rule reads: "No attorney or other

officer of the court shall be surety in any cause pending in court, except under special leave of the court": 47 Tex. 626, rule 50. We think the general understanding of the courts and of the bar in our state has been that the rule was merely intended to protect the officers of the court against the importunity of litigants; that it is merely directory, and hence if an officer become a surety in contravention of the rule, his act is neither void nor voidable. The purpose of the regulation is sufficiently accomplished by punishing the offender for contempt of court without holding the bond a nullity. To follow even the modified practice of the court of king's bench, and to hold an obligation with such surety even voidable upon exception, is to apply a harsh remedy and in some cases to work an injustice, which the court in adopting the rule did not contemplate.

We think the court below erred in holding the bond void, and for this error the judgment will be reversed and the cause remanded, with instruction to remove the cause as prayed for in the petition for that purpose.

AFFIDAVIT NEED NOT BE SIGNED by deponent, unless required by statute: *Shelton v. Berry*, 70 Am. Dec. 326.

AFFIDAVIT DEFINED: *Shelton v. Berry*, 70 Am. Dec. 326; amendment of affidavit: *Tunis v. Withrow*, 77 Id. 117, and note 119; *Hallett v. Chicago etc. R. R. Co.*, 92 Id. 393.

AFFIDAVIT CANNOT BE USED IN CASE, UNLESS IT IS PROPERLY ENTITLED: *Watson v. Reissig*, 76 Am. Dec. 746.

PULLMAN PALACE CAR COMPANY v. POLLOCK.

[69 TEXAS, 120.]

COMMON CARRIERS. — SLEEPING-CAR COMPANY IS BOUND TO EXERCISE REASONABLE CARE in guarding passengers from theft, and if through the want of such care the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor.

ID. — COMPANY OWNING AND OPERATING SLEEPING-CAR IS STILL PASSENGER CARRIER, and is liable as such, notwithstanding the fact that the main compensation for the passenger's transportation was received by the railway company, to whose train the sleeping-car was attached.

ID. — IF PASSENGER RETAINS EXCLUSIVE CUSTODY OF HIS BAGGAGE, CARRIER IS NOT RESPONSIBLE for its loss, unless such loss results from the carrier's negligence, and the failure of the passenger to use reasonable care in reference to it will defeat his right to recover.

ACTION against the Pullman Palace Car Company to recover the value of a valise and its contents. The facts appear in the opinion.

William Burry, Scott and Jones, and Todd and Rowell, for the appellant.

C. A. Culberson, for the appellee.

STAYTON, J. This action was brought by the appellee to recover the value of a valise and its contents, consisting of such articles as persons traveling need and usually carry with them. The cause was tried without a jury, and a judgment was rendered in favor of the plaintiff.

The facts are undisputed, and are in substance as follows: At Marshall the appellee engaged and paid for a berth in the sleeping-car of the appellant, attached to a train on the Texas and Pacific Railway, his destination being Dallas. He entered the sleeper carrying his valise, which he placed on the floor of the smoking-room. When the train arrived at Terrell about night, it was ascertained that a wreck between that place and Dallas would cause some delay, and the train backed down to the depot and stopped. Pollock then went to the telegraph-office to ascertain how long the train would be delayed, leaving the porter and conductor of the Pullman company in the sleeper. After remaining at the telegraph-office a short time, he returned, and on entering the car found that his valise was missing, and that the porter was not in the car. He, however, found the conductor in the rear end of the sleeper, to whom he made known his loss, whereupon the conductor informed him that he was then on his first trip as conductor, and not familiar with the details of his duties.

The loss occurred on October 27, 1886, and the train reached Terrell about six or seven o'clock P. M. The doors of the sleeper were open when the appellee returned to it after going to the telegraph-office. The evidence tends to show that the porter knew that the appellee deposited his valise on the floor of the smoking-room of the sleeper. The conclusions of law and fact found by the judge who tried the cause seem not to have been asked, or, at least, are not found in the transcript. There is no evidence tending to show the true relation between the railway company and the appellant, or tending to show the true relation of the appellant to persons who, after having acquired the right to be transported and to occupy a berth in

its sleeper, entered it with his baggage, further than as this may appear from the statement already made. Enough, however, appears to show that the appellant assumed to the appellee the duties of a carrier, and while it is evidently true that it did not assume the duties and liabilities which the common law imposes upon common carriers as to ordinary freight, or the liabilities which the innkeeper assumes to guests, yet we see no reason why it should not be held responsible just as any common carrier would be held responsible for a failure to perform the duties which devolve upon the common carrier in relation to the baggage of a passenger which is not given into the carrier's exclusive custody.

The true rule, in this class of cases, we believe to be that asserted by the supreme court of Massachusetts in the case of *Lewis v. New York Sleeping Car Co.*, 28 Am. & Eng. R. R. Cas. 150. In that case, it is said that "while it is not liable as a common carrier or as an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor. Such a rule is required by public policy, and by the true interest of both the passenger and the company, and the decided weight of authority supports it: *Woodruff Sleeping Car Co. v. Diehl*, 84 Ind. 474; *Pullman Palace Car Co. v. Gaylord*, 23 Am. Law Reg., N. S., 788."

The facts that a railway company to whose train a sleeping-car may be attached may not own such car or control its internal management, and that the same may be under the control of a company who does own and operate such car, and that the minimum compensation for transportation may be paid to the company to whose train the sleeper is attached, do not deprive the company so owning and operating a sleeping-car of the character of passenger carrier; for the contract of such a company is not only that the passenger may sit and sleep in the car during the journey for which he contracts, but it goes further, and binds the owner of such car to transport the passenger in it, or some like carriage, to the place of destination, the passenger having paid the fare demanded by both companies.

If passengers by railway train retain the exclusive custody of their baggage, then the carrier is not responsible for its loss unless this results from the carrier's negligence; and the fail-

ure of a passenger to use reasonable care in reference to it will defeat his right to recover.

In the case before us, the court below, in the absence of conclusions of fact and law showing to the contrary, must be presumed to have decided this case in accordance with the rules we have announced. This involved a finding of fact that the valise was lost by reason of the failure of the appellant to use such care as the law requires, and so, without failure on the part of the appellee to use that care required of him. Under the evidence, we are not prepared to hold that such a finding of fact was not authorized, and the judgment must be affirmed.

LIABILITY OF COMMON CARRIER FOR LOSS OF PASSENGER'S BAGGAGE: *Indianapolis etc. R. R. Co. v. Cox*, 95 Am. Dec. 640, and note 644; *Louisville etc. R. R. Co. v. Weaver*, 42 Am. Rep. 654, and note 664; *Lake Shore etc. R. R. Co. v. Foster*, 54 Id. 319; *Rome Railroad v. Wimberly*, 58 Id. 468; *Tower v. Utica etc. R. R. Co.*, 42 Am. Dec. 37, 38.

SLEEPING-CAR COMPANY, DUTY OF, AS TO PASSENGER'S EFFECTS: *Illinois Central R. R. Co. v. Handy*, 56 Am. Rep. 846, and note 850-852; liability of, for refusing berth: *Lawrence v. Pullman Palace Car Co.*, 59 Id. 58; and see *Pullman Palace Car Co. v. Reed*, 20 Id. 232.

DUTIES AND LIABILITIES OF SLEEPING-CAR COMPANIES. — *In General.* — The use of sleeping-cars upon railroads is comparatively recent, and the adjudications are not entirely harmonious as to the scope of the duties and liabilities of their owners. The authorities concur, however, in holding that the law does not impose upon a sleeping-car company the severe liability of an innkeeper or a common carrier: See *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. 500; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; 24 Am. Rep. 258; *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr., N. S., 352; *Pullman Palace Car Co. v. Gaylord*, 23 Am. Law Reg. 788 (Sup. Ct. Ky.); *Pullman Palace Car Co. v. Gardner*, 16 Am. & Eng. R'y Cas. 324 (Sup. Ct. Pa.); *Woodruff Sleeping and Parlor Coach Co. v. Diehl*, 84 Ind. 474; 43 Am. Rep. 102; and it may be stated as a general rule, settled by the weight of authority, that such companies are only bound to employ ordinary care and watchfulness over passengers and their property: Id. They owe and assume to their patrons the duty of exercising such reasonable guard over them and their property as the circumstances admit and the passenger has a right to expect, but they do not incur such liability as pertains to common carriers or innkeepers: *Illinois Central R. R. Co. v. Handy*, 63 Miss. 609; 56 Am. Rep. 846.

Nature of Contract between Company and Passenger. — When a person buys the right to the use of a berth in a sleeping-car, the ticket he receives is not intended to, and does not, express all the terms of the contract into which he enters; but this contract is, for the most part, implied from the nature and usages of the employment of the company. Thus the sleeping-car company holds itself out to the world as furnishing safe and comfortable cars, and when it sells a ticket, it impliedly stipulates that it has furnished such cars: *Lewis v. New York Sleeping Car Co.*, 123 Mass. 267, 273; 56 Am. Rep. 852. It likewise impliedly stipulates to use all reasonable and proper means to preserve order and decorum in the sleeping-car, to furnish and keep on hand such supplies and conveniences as are usually found in like cars, and are neces-

sary to the health, comfort, and safety of passengers, and also to permit the passenger to quietly and peaceably occupy his berth for the time engaged: *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222; 46 Am. Rep. 688. On the other hand, the passenger impliedly agrees to conduct himself in a quiet and orderly manner, to take proper care of the berth while it is in his possession, and to give it up at the end of his journey in as good condition as when assigned to him, necessary wear excepted: *Id.* A sleeping-car company must treat all persons whose patronage it has solicited with fairness, and without unjust discrimination. Where there are berths not engaged, it is the duty of the company, upon the payment or tender of the customary price, to furnish them to applicants when properly called for by unobjectionable persons; and it is liable for a breach of such duty to the party injured thereby: *Id.*; and see *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. 500, 506. But it is not bound to furnish a berth until the applicant therefor becomes entitled to transportation by the railroad company as a passenger; and he must also be entitled to the transportation for such routes, distances, or under such circumstances as the latter company should determine to be those under which the former would be authorized to furnish him with a berth: *Lawrence v. Pullman Palace Car Co.*, 144 Mass. 1; 59 Am. Rep. 58. But where, by the purchase of a ticket from a sleeping-car company, a passenger becomes rightfully entitled to a certain berth in a certain car, between designated stations, he is entitled to a continuous passage in such berth, on such car, or in an equally desirable berth on an equally safe, convenient, and comfortable sleeping-car, to his destination; and for a breach of its contract the company may be held liable in damages: *Pullman Palace Car Co. v. Taylor*, 65 Ind. 153; 32 Am. Rep. 57.

Care Required as to Passenger's Property. — Although the rigid liability of a common carrier or innkeeper is not to be applied to sleeping-car companies, yet such companies are bound to protect passengers and the property about their persons, especially during sleep. The cars are in themselves an invitation to the traveling public to enter, and protect themselves against the weariness of a long journey by disrobing and sleeping; and the passenger in buying and the company in selling the ticket contemplate that this privilege will be improved. The company, by accepting compensation under these circumstances, impliedly undertakes to keep a reasonable watch over the passenger and his property: *Woodruff Sleeping and Parlor Coach Co. v. Diehl*, 84 Ind. 474; 43 Am. Rep. 102; *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267; 56 Am. Rep. 852. But the faithful performance of this undertaking on the part of the company is the limit of its duty in this respect, and its breach must be the foundation of every action seeking to charge the company with the loss of articles which the passenger has taken with him upon the car: *Woodruff Sleeping and Parlor Coach Co. v. Diehl*, 84 Ind. 474; 43 Am. Rep. 102; *Pullman Palace Car Co. v. Gaylord*, 23 Am. Law Reg. 788 (Sup. Ct. Ky.). The company can only be made responsible by evidence of its neglect to keep that reasonable guard which its contract implies that it will: *Illinois Central R. R. Co. v. Handy*, 63 Miss. 609; 56 Am. Rep. 846. The mere fact that property was lost while under the exclusive control of the passenger, unaccompanied by any other proof, raises no presumption of negligence on the part of the company: *Tracy v. Pullman Palace Car Co.*, 67 How. Pr. 154; and see *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; 24 Am. Rep. 258; *Hillis v. Chicago etc. R. R. Co.*, 72 Iowa, 228. But where the doors of the car are left open and unguarded, so that unauthorized persons may enter, or the officers charged with the care of the car leave it without that supervision by them

which the passengers have a right to rely on, this is held to be such negligence as would render the company liable for a loss: *Woodruff Sleeping and Parlor Coach Co. v. Diehl*, 84 Ind. 474; 43 Am. Rep. 102; *Illinois Central R. R. Co. v. Handy*, 63 Miss. 609; 56 Am. Rep. 846; *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. 500. In such case, its liability is limited, however, to the loss of such articles as are usually carried by a passenger, and to such a sum of money as may be deemed reasonably necessary for traveling expenses: *Id.*; *Pullman Palace Car Co. v. Gardner*, 16 Am. & Eng. R. R. Cas. 324 (Sup. Ct. Pa.). And if the party sustaining the loss was guilty of negligence which contributed thereto, there can be no recovery against the company: *Whitney v. Pullman Palace Car Co.*, 143 Mass. 243. But a sleeping-car company cannot avoid its liability by posting in the car a notice disclaiming responsibility for personal property in berths, if the notice is not known to the passenger: *Lewis v. New York Sleeping Car Co.*, 143 Id. 267; 56 Am. Rep. 852.

Liability for Personal Injury to Passenger. — A sleeping-car company is liable for personal injuries sustained by a passenger through the negligent or wrongful act of its servant, when done within the scope or general course of his employment. But the injuries must be the natural and proximate consequence of such wrongful act, otherwise there can be no recovery: *Pullman Palace Car Co. v. Barker*, 4 Col. 344. It is immaterial, however, that the wrongful act was done contrary to orders, and a sleeping-car company was held liable to a passenger injured by the negligence of its porter in letting a pistol carried by him fall upon the floor of the car, although he was carrying the pistol for a passenger, and had been expressly forbidden to carry any baggage for passengers: *Heinrich v. Pullman Palace Car Co.*, 10 Saw. 80. But a railway passenger traveling in the coach of a sleeping-car company, who sustains an injury through the negligence of such company, may maintain an action therefor against the railroad company: *Railroad Company v. Walrath*, 38 Ohio St. 461; 43 Am. Rep. 433; for, in the absence of notice that the railroad company will not be liable for defective appliances in the sleeping-car, or for the negligence of the servants of the sleeping-car company, a passenger may well assume that the whole train is under one general management: *Id.* And the law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey: *Pennsylvania Company v. Roy*, 102 U. S. 451; *Thorpe v. New York etc. R. R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325; and see *Kinsley v. Railroad Company*, 125 Mass. 54; 28 Am. Rep. 200. So, in an action against a railroad company to recover for baggage lost through the negligence of the porter of a sleeping-car, it was held that the railroad company was liable for the loss, and that no contracts with the sleeping-car company could relieve the railroad company from such liability: *Louisville etc. R. R. Co. v. Katzenbroger*, 16 Lea, 380; 57 Am. Rep. 230.

RIORDAN v. BRITTON.

[69 TEXAS, 193.]

ATTACHMENT. — It is not requisite to the validity of a levy of attachment on real estate that the officer should go upon the land, or into its vicinity, in making the levy. The lien acquired upon property attached dates from the time the officer indorses the levy on the writ; and without such indorsement the levy is invalid, whatever other acts may have been performed by the officer in making it.

ID. — **LEVY UNDER WRIT OF ATTACHMENT IS NOT VOID AS AGAINST CREDITOR CLAIMING** under a junior attachment, because of an insufficient description of the property, the description given at the time the levy was indorsed upon the writ and signed by the officer being, "also storehouse and lots," it being conclusively shown that the attorney for the junior attaching creditor well knew what property was intended to be, and actually was, levied on.

ID. — **LIEN OF ATTACHMENT IS NOT FORFEITED BY DELAY IN RETURNING WRIT**, which was issued in February, 1882, and returned in January, 1883, it appearing that the attorneys for the attaching creditor used due diligence and made repeated efforts to procure the return of the writ.

BOTH parties, appellant and appellee, claimed title to the two lots in controversy, under J. M. Cupp & Co., and through sheriff's sales made under judgments rendered in attachment suits against Cupp & Co., foreclosing attachment liens. The appellee claimed through such a sale made July 3, 1883, under a judgment rendered May 19, 1883, against J. M. Cupp & Co., and a deed from the sheriff conveying the property to the appellee. The appellant claimed through a sale made June 6, 1882, under a judgment rendered March 10, 1882, against the said J. M. Cupp & Co., and a sheriff's deed to Jeremiah Riordan, the husband of the appellant, Josephine, and father of the other appellants. Jeremiah Riordan took possession of the property a few days after his purchase, and afterwards died. Twenty-one writs of attachment against Cupp & Co., including the two involved in this suit, were placed in the hands of the deputy sheriff of Mitchell County within a few days of the same date, and were numbered from one to twenty-one, in the order he received them. The writ under which appellee claims was numbered eight, and that under which appellants claim was numbered twelve. Writ number eight was issued February 10, 1882, and placed in the hands of the officer in the morning of February 12, 1882, with instructions from the attorney for the plaintiff to levy it upon the stock of goods and the lots in controversy, which were then owned by and in the possession of Cupp & Co. The officer went with the attorney into the storehouse upon the lots in controversy,

and there publicly declared in the presence of witnesses that he levied the writ upon the stock of merchandise and the lots in controversy. To the attorney's proposal then to indorse the levy upon the writ, the officer said he would get a correct description of the lots, and indorse the levy on the writ. This writ was returnable to the spring term, 1882, and it appeared from the sheriff's return indorsed thereon that it was levied upon the property in controversy, describing it, on February 12, 1882, but was not returned until January 2, 1883. Writ number twelve was issued February 14, 1882, and placed in the hands of the officer on the same day, with instructions from the attorney for the plaintiffs to levy it upon the same property that he had been instructed to levy number eight upon. No indorsement of levy was made by the officer upon any of the writs of attachment against Cupp & Co. until about February 20, 1882, when R. H. Looney, counsel for the plaintiffs in writ number twelve, wrote the returns upon all the writs of attachment for the officer, in the order the writs were numbered, and the returns were signed by the officer. After indorsing upon writ number eight the levy upon the stock of goods, Looney added, "also storehouse and lots," by direction of the officer, without giving numbers of lots or block. The levy indorsed upon writ number twelve correctly described the property in controversy. In October, 1882, after the return day of writ number eight, but before it was returned, the officer amended his levy by adding a more specific and correct description of the property. Jeremiah Riordan had actual notice in March, 1882, that writ number eight had been levied on the property in controversy; but Schneider and Davis, plaintiffs in writ number twelve, both testified that they never heard of such levy. Other facts appear in the opinion.

J. D. Martin, for the appellant.

Ball and McCart, for the appellees.

ACKER, J. It is provided by our Revised Statutes that "the writ of attachment shall be levied in the same manner as is, or may be, the writ of execution": Art. 167. It is further provided that "in order to make a levy on real estate, it shall not be necessary for the officer to go upon the ground, but it shall be sufficient for him to indorse such levy upon the writ": Art. 2291.

In *Sanger Brothers v. Trammell*, 66 Tex. 361, it is said: "This is but declaratory of what the law was previous to the adoption of the Revised Statutes: *Hancock v. Henderson*, 45 Id. 479. Neither the statutes nor the decisions of this state have recognized any other method except this of making a levy upon land; and without some statutory provision, the mode adopted in Texas seems to not only be the proper, but the necessary, method of making the levy: *Drake on Attachments*, sec. 236. Whatever other acts may be performed by the sheriff in making the levy, the indorsement upon the execution or attachment must take place before the levy is complete. All other steps are unnecessary, and none of them, by force of our laws, can give validity to a levy unaccompanied by an indorsement. Hence, from the time of making the indorsement must be dated the lien acquired upon the property."

We therefore conclude that the court erred in its finding that the act of an officer, in going upon the premises on the morning of the 12th of February, 1882, and there declaring that he levied the writ, under which appellee claims, upon the property in controversy, constituted a valid levy. But is this such error as requires, under the facts of this case, a reversal of the judgment below? We think not; for it conclusively appears, from the evidence, that the levy was indorsed upon the writ under which appellee claims prior to the indorsement of the levy upon the writ under which appellant claims.

It is insisted by appellant that the levy upon the writ under which appellee claims is void, for want of sufficient description of the property, the description given at the time the levy was indorsed upon the writ and signed by the officer being, "also storehouse and lots." Without deciding that this description would be sufficient generally, or in any other case, we hold that, under the facts of this case, it accomplished all that the most specific description could have done, so far as the interest of appellants is concerned. It is conclusively proven that Looney, who, at the time he wrote the indorsements upon the writs, was attorney for Schneider and Davis, plaintiffs in the writ under which appellant claims, knew that the officer intended the levy to apply to the property in controversy. His clients were as much bound by this knowledge of his as they would have been had the fact been communicated to them personally: *Givens v. Taylor*, 6 Tex. 315; *Van Hook v. Walton*, 28 Id. 72; *Catlin v. Bennatt*, 47 Id.

171; *Harrington v. United States*, 11 Wall. 356; Story on Agency, secs. 24, 140; 1 Story's Eq. Jur., sec. 408, and note.

It clearly appears, from the evidence, that one of the attorneys for plaintiff in the writ under which appellee claims gave Jeremiah Riordan actual notice, in March, before he purchased in June, that the writ under which appellee claims had been levied on the property. We think, therefore, that the court did not err in finding that Riordan was not an innocent purchaser.

Appellants contend that the court erred in overruling their objection to the testimony of the witness Looney, given on cross-examination, "because there were no allegations in appellee's pleadings to authorize such evidence." The witness was introduced by appellant, and had testified to having written the levy and return on the writ under which appellee claims, and that there was no description given of the property in the levy at the time it was signed by the officer other than "storehouse and lots." Appellee had alleged, in his supplemental petition, that plaintiff in the writ under which appellant claims had notice of the prior levy of the writ under which appellee claims, and that Jeremiah Riordan had notice. The testimony was admissible, under the allegations, in explanation of qualification of statements made by the witness on his direct examination, as it was also for the purpose of proving notice upon clients of the witness: *Givens v. Taylor*, 6 Tex. 321, and authorities *supra*.

It is insisted by appellant that the laches of plaintiff in the writ under which appellee claims, in failing to have it returned until January, 1883, was a forfeiture of the levy as to appellant. It appears that the attorneys for plaintiff in the writ made repeated efforts to have it returned by the sheriff of Mitchell County, and in a contest upon that issue between the plaintiff and defendant in that writ this court held that the lien was not lost: *City Bank v. Cupp*, 59 Tex. 268. The plaintiffs in the writ under which appellant claims, and Riordan, the purchaser thereunder, both had notice of the prior levy of the writ under which appellee claims, and we conclude that the lien was not forfeited.

We find no error in the record that we think requires reversal, and it is our opinion that the judgment of the district court should be affirmed.

TO CONSTITUTE VALID LEVY ON LAND, sheriff need not go upon it: See *Duncan v. Matney*, 77 Am. Dec. 575, and note.

LEVY OF ATTACHMENT, VALIDITY OF: *Allen v. McColla*, 96 Am. Dec. 56, and note 64; what essential to: *Hollister v. Goodale*, 21 Id. 674, and note 677; see Freeman on Executions, sec. 280 a, 280 b.

WRIT OF ATTACHMENT VOID by reason of misnomer of defendant therein: *Dutton v. Simmons*, 20 Am. Rep. 729.

WRIT OF ATTACHMENT IS ONLY EFFECTUAL to change title to goods from the time of its levy: *Taffs v. Manlove*, 73 Am. Dec. 610.

LANE v. PHILIPS.

[69 TEXAS, 240.]

HOMESTEADS. — MAN AND WOMAN, LIVING TOGETHER IN ADULTERY, DO NOT CONSTITUTE FAMILY, within the meaning of the law exempting the homestead from forced sale under execution. But a father, and his illegitimate children living with him, constitute a family such as may assert homestead rights, and such rights cannot be defeated by the fact that the father permitted a woman with whom he unlawfully cohabited to dwell on the land.

ACTION of trespass to try title. The opinion states the case.

S. W. Blount, for the appellant.

Rufus Price, for the appellee.

STAYTON, J. This is an action of trespass to try title, which was instituted by the appellant, and tried without a jury. It appears, from the conclusions of fact filed, that the appellant was the owner of the land, and that a judgment was obtained against him on which an execution issued, and this was levied on the land in controversy, which was subsequently sold, and at that sale the appellee became the purchaser. Those proceedings were found to be regular and sufficient to pass title to the appellee, unless the property was the homestead of the appellant at the time of the levy. The facts bearing on that question are thus stated in the conclusions of fact: "At the date of said levy plaintiff was a single man, had never been married, but was living in a house on said land, occupying the same as a home, and had so resided more than five years before said time; that he had living with him a woman, with whom he had lived and cohabited for more than twelve years before the levy, and two illegitimate children, of whom he was the father and said woman the mother; that he and said woman and children lived together in all respects as husband and wife and children, except that he and said woman had never been married."

It further appears that part of the land was cultivated. There is also a finding that a sister of the appellant and her children lived on the land, which was contiguous to some owned by her; but as this fact bears no influence upon the decision which will be made upon this appeal, the particulars of the sister's occupancy need not be stated.

The court found that such an aggregation of persons did not constitute a family, within the meaning of the law exempting the homestead from forced sale, and entered a judgment in favor of the defendant. The correctness of this conclusion is the sole question in the case, the tract of land containing less than two hundred acres.

It is very clear that a family, such as is contemplated by the constitution and laws exempting the homestead from forced sale, cannot be made up with constituents consisting only of a man and a woman living together, as were the appellant and the woman with whom he was living. The law prohibits and makes penal such cohabitation as existed between the appellant and the woman with whom he lived; and it never was intended that persons so associated, and living in plain violation of law, should be deemed a family, which it is the purpose of the homestead exemption to protect. To constitute a family, within the meaning of the law giving the homestead exemption, the persons who dwell together must not, in the fact of so doing, be violators of the law of the land.

If, however, the relationship between the appellant and the children who lived with him be such as to constitute these persons a family, then his homestead right must be recognized and enforced, notwithstanding the fact that his cohabitation with the woman was illegal; for the homestead right existing by reason of and for the protection of the family, of whomsoever composed, cannot be defeated by the fact that the head of the family permitted another person, with whom he unlawfully cohabited, to dwell on the land: *Whitehead v. Topp*, 69 Mo. 415. There has been much controversy as to the relationship which must exist between persons dwelling together to constitute a family, within the meaning of the laws giving the homestead exemption; but we will not attempt to reconcile them, or lay down a rule which can be applied in all cases. If the children who live with the appellant had been born unto him in wedlock, no one would question that they and he would constitute a family entitled to homestead exemption, though he was living with a mistress. They, how-

ever, were not so born unto him; and while they are his children in fact, the rules of the common law refuse to recognize them as his children, to impose upon him the duties and obligations which the lawful father cannot avoid, or to confer upon them the right to support and paternal care which the child begotten in wedlock has.

The harshness of this rule has long been felt in England, and in some of the states statutes have existed, and still exist, which compel the father of an illegitimate child to support it or contribute to its support. Such statutes well illustrate the fact that such a father does not sustain the same relation to his illegitimate child, with reference to obligation to support it, as one not so related to it does. Upon what theory can statutes such as we have referred to be held valid? It has usually been said the state has the power to pass such laws in order to protect the public from liability to support the child, and this may be admitted; but if there be no liability resting on the father to support the child other than such as he must bear in common with other members of society, whence the power to impose upon him the entire burden? A statute which would require A to support the child of B would most probably be held contrary to such constitutional provisions as provide for equality in public burdens, or would be held to be the exercise of an arbitrary power inconsistent with that relation between the state and the citizen, which all governments not thoroughly despotic recognize. Such statutes as we have referred to are standing protests against the common-law rule as to the obligation of a father to support his illegitimate child.

They recognize, however, not only the high moral obligation the father is under in such cases, but also the natural obligation which the common law, for reasons of public policy, refused to enforce; for it would be difficult to justify a law embracing or imposing a personal obligation, upon the sole ground that its enforcement would compel the performance of a merely moral duty. There is a natural obligation on one who, out of wedlock, has brought a child into existence, to support it during the years of its inability to take care of itself.

If a statute existed in this state which authorized the father of an illegitimate child to have its custody and made him liable for its support, no one would question that such a father and child, living together, would constitute a family.

If, without a statute, the father recognizes his natural and moral obligation to the child and takes it to his home and there supports it, is his ability to do this to be restricted by withholding from him the exemption which he would be entitled to if he did, under legal compulsion, that which he does voluntarily? Such is, in our opinion, not the spirit of the laws giving exemptions. No stronger natural or moral obligation could rest on the appellant than that which he is under to support his children who live with him, illegitimate though they be; and we are unwilling to hold that nothing short of a legal obligation to support them will suffice to make them constituents of his family.

This case, in its facts, is much like the case of *Bell v. Keach*, 80 Ky. 44. In that case, property claimed to be exempt was seized and sold under execution, and it appeared that the person claiming the exemption without marriage had lived with a woman for about twenty years, she passing for his wife and having by him one son, then about nineteen years of age. The father, mother, and son, constituted the family, and in disposing of the case the court said: "It may be true that the appellee and the woman residing with him were living in adultery, and that he may not have been strictly under any natural or legal obligation to support her; and counsel for appellant contends that it would be against public policy, as well as the spirit of the exemption laws, to treat persons thus dwelling together as entitled to its salutary provisions. But it is not necessary to decide how the exemption laws should be construed or administered, if they alone were to be affected. For whatever may be their offenses, or the relation they sustain to each other, appellee was under a natural and moral obligation to support his infant son, though he may have been born out of wedlock; and, so far from being against, it is in accordance with, the spirit of the law, as well as public policy, that he should be treated as a member of the family of appellee."

We are of the opinion that the appellant and his children constituted such a family as is entitled to the homestead exemption, that the property in controversy was not subject to forced sale, and that judgment should have been rendered in his favor.

The judgment of the district court will be reversed and here rendered in favor of the appellant.

It is so ordered.

WHAT CONSTITUTES "FAMILY" WITHIN MEANING OF EXEMPTION LAWS: See the extended note to *Wade v. Jones*, 61 Am. Dec. 586-592.

WIFE AS "HEAD OF FAMILY" WITHIN MEANING OF HOMESTEAD LAW: See *McFee v. O'Rourke*, 3 Am. St. Rep. 579. As to what constitutes family within meaning of homestead law, see *Wilson v. Cochran*, 98 Am. Dec. 553; *Seaton v. Marshall*, 99 Id. 683, and note 684.

HOMESTEAD STATUTES ARE TO BE LIBERALLY CONSTRUED: *Riggs v. Sterling*, 1 Am. St. Rep. 554; *Deere v. Chapman*, 79 Am. Dec. 350.

WIFE'S FORFEITURE OF HOMESTEAD RIGHT BY ABANDONING HER HUSBAND: *Succession of Christie*, 96 Am. Dec. 414, -note.

WIFE PERMANENTLY SEPARATED FROM HER HUSBAND BY AGREEMENT, AFTER HIS NEGLECT TO SUPPORT HER, MAY ACQUIRE A HOMESTEAD: *Kenley v. Hudelson*, 39 Am. Rep. 31.

PARENT, THOUGH NEVER MARRIED, may successfully claim a homestead, if he has living with him his illegitimate child, who is entitled to protection and support: *Ellis v. White*, 47 Cal. 73.

INTERNATIONAL ETC. RAILROAD COMPANY v. TELEPHONE ETC. COMPANY.

[69 TEXAS, 277.]

DAMAGES. — ALTHOUGH SENSE OF WRONG OR INSULT MAY NOT CONSTITUTE LEGAL BASIS FOR EXEMPLARY DAMAGES in an action by a corporation for a malicious and oppressive trespass committed upon its property, yet when the result of such trespass is to impair the credit of the corporation and subject it to the expense of litigation, for these injuries it is entitled to claim such damage.

EVIDENCE. — IN ACTION AGAINST CORPORATION FOR MALICIOUS TRESPASS, declarations made by a servant of the defendant indicating his own reckless indifference to consequences regarding the trespass are inadmissible in evidence. But other declarations of such servant in regard to the trespass complained of, made before its completion, and concerning a matter within the scope of his authority, are admissible, as tending to show the *animus* of the defendant.

ID. — CONCLUSION OF WITNESS. — The testimony of a witness that he knew the meaning of an order to "work" a train between two stations named, but not stating what that meaning was, is not open to the objection that it states the conclusion of the witness.

DAMAGES. — EXEMPLARY DAMAGES, WHEN ALLOWED, SHOULD BE PROPORTIONED to the actual damages sustained; and ten thousand dollars exemplary damages, when the actual damages found by the jury were but two hundred dollars, is clearly excessive, and should be set aside. Such disproportion manifests that the jury were influenced by passion, prejudice, or partiality.

ACTION to recover damages for a malicious trespass. The opinion states the case.

Hutcheson and Franklin, for the appellant.

Waelder and Upson, for the appellee.

GAINES, J. This was an action brought in the court below by the appellee against the appellant to recover damages, actual and exemplary, for the destruction by appellant's agents and servants of a portion of appellee's telegraph and telephone line.

The first question presented is raised by the assignment that the court erred in overruling appellant's exception to so much of the petition as sought to recover exemplary damages. The plaintiff sued as a corporation; and appellee contends that a corporation can, in an action of this sort, recover only actual damages. In their written argument in support of this position, counsel frankly admit that they have found no direct decision upon the point, either by our courts, or the courts of other states, or of England. It is argued, however, that such damages are never awarded solely by way of punishment, but are given in a proper case for the purpose of example and punishment, as a compensation for mental pain suffered by the plaintiff by reason of the outrages or oppressive conduct of the defendant; and that a corporation, being an artificial person, and having no mind to suffer, is incapable of receiving the specific injury upon which such damages must be based.

It may be difficult to defend, upon sound reasoning, the doctrine of vindictive damages now so firmly intrenched in the common law, upon the theory that they are allowed alone for the purpose of punishment and the good of society; but admitting, for the argument's sake, that the position of counsel upon this point is correct, it must be answered that there are other elements of injury besides "the sense of wrong or insult" which offered a legal basis for exemplary damages; such, for example, as loss of credit and expense of litigation. These injuries corporations may suffer as well as individuals; and hence we conclude that when a malicious and oppressive trespass is committed upon their property, they have the right to claim such damages, the amount to be fixed by the jury, as in other cases, in some proportion to the actual damage and the detrimental consequences to the plaintiff proved upon the trial.

With one exception, the declarations of Painter to R. J. Brackenridge — the admission of which is complained of in the second assignment of error — were properly admitted in evidence. Painter was in the employment of defendant, and the testimony shows that he was its agent, charged with the duty of removing plaintiff's poles from the right of way. The

declarations were about a matter in the scope of his authority, and before the transaction to which they referred was completed. They tended to show that the defendant's officers or agents claimed that plaintiff's line was partly on defendant's right of way, and that they had determined to remove the poles. This applies to all the declarations except the statement that "he [Painter] would obey orders if it broke owners." Under the issues made in this case, according to the authority of the ruling in the case of *Houston etc. Ry Co. v. Willie*, 53 Tex. 319, we are of the opinion that that declaration should have been excluded.

Appellant's third assignment of error is not well taken. The testimony which was objected to proved directly the pulling up of the poles, and tended strongly to show that it was done by order of defendant's train-master, Painter. The witness testified that he was sent by Painter to one Jack, an engineer on the railroad, with a train for orders; that the engineer received the orders, which were to "work" the train between San Marcos and Hunter Station, and that they knew what was meant. This was objected to on the grounds "that it appeared from the testimony itself that the witness was not stating facts within his own knowledge, but from information and belief, and was stating conclusions as to the meaning of the orders he supposed Jack to have received." But the evidence is not obnoxious to these objections. All the witness testified to was peculiarly within his own knowledge, except as to the orders received by the engineer. He does not say that these were communicated to him by the latter, and the presumption must be that he knew them of his own knowledge. The witness says he knew the meaning of the orders, but does not say what that meaning was, and hence that portion of his testimony is not liable to the objection interposed by appellant, that it states the conclusions of the witness.

Appellant filed a motion for a new trial upon the ground, among others, that the exemplary damages found by the jury were excessive. The motion was overruled, and this action of the court is assigned as error. The actual damages found by the jury were but two hundred dollars. The evidence would not have warranted more than this amount. The verdict, however, was for ten thousand dollars as exemplary damages.

It is difficult to lay down any rule by which to test the question of excess in a verdict for vindictive damage. They are very largely in the discretion of the jury. But it is said,

in the case of the *Railroad Co. v. Nichols*, Austin Term, 1882, "Exemplary damages, when allowed, should be in proportion to the actual damages sustained." This language was quoted with approbation, and the rule acted upon, in the case of *Willis and Brother v. McNeill*, 54 Tex. 465. In both the cases cited, the verdict was held excessive. In the former, the proportion of actual to exemplary damages was as one to four, and in the latter (approximately) as one to twelve. In the case before us, the proportion is as one to fifty. There is nothing in the evidence to make this case an exceptional case for exemplary damages. The verdict is clearly excessive, and it is manifest, from the disproportion between the actual injury sustained and the aggregate sum awarded, that the jury were influenced by passion, prejudice, or partiality. Therefore it should have been set aside, and a new trial awarded.

The other questions presented by the assignments of error, and not directly or indirectly considered, are not likely to arise upon another trial, and need not be discussed.

For the errors which have been pointed out, the judgment will be reversed, and the cause remanded.

IMPAIRMENT OF CREDIT is proper subject for consideration in allowing damages: *Peshine v. Shepperson*, 94 Am. Dec. 468, and note.

RECOVERY WILL BE CONFINED TO COMPENSATORY DAMAGES, in absence of circumstances of aggravation: *Hart v. St. Louis etc. R'y Co.*, 4 Am. St. Rep. 374, and note.

EXEMPLARY DAMAGES, injury to feelings as element of: *Stuart v. Telegraph Co.*, 59 Am. Rep. 623; *Porter v. Railroad Co.*, 36 Id. 454. General rules with respect to allowance of: *Austin v. Wilson*, 50 Am. Dec. 767, note; *Southern R. R. Co. v. Kendrick*, 90 Id. 332.

EXEMPLARY DAMAGES in actions of trespass: *Perkins v. Towle*, 80 Am. Dec. 149; *Best v. Allen*, 81 Id. 338; *Meagher v. Driscoll*, 96 Id. 759.

JUDGMENT FOR EXEMPLARY DAMAGES WILL NOT BE REVERSED unless so excessive as to warrant belief that the verdict was the result of prejudice, passion, or corruption: *Sheehy v. Kansas City R'y Co.*, 4 Am. St. Rep. 396, and note; *Jacksonville etc. R'y Co. v. Roberts*, 22 Fla. 324.

JURY HAVE RIGHT TO GIVE DAMAGES IN PROPORTION TO CIRCUMSTANCES OF AGGRAVATION AND OUTRAGE: *Peshine v. Shepperson*, 94 Am. Dec. 468; and will rarely be interfered with in estimating them: *New Orleans etc. R. R. Co. v. Hurst*, 74 Id. 790, note.

BYNUM v. PRESTON.

[69 TEXAS, 287.]

PLEADING. — IT IS NOT ERROR TO OVERRULE EXCEPTION TO PETITION based on the ground that the exhibits filed therewith contradict the allegations, where, although the petition refers to exhibits as having been made parts thereof, it appears from an inspection of the transcript that no such exhibits are contained in the record.

ESTOPPEL. — ESSENTIAL ELEMENTS OF ESTOPPEL ARE, — 1. A false representation or concealment of material facts; 2. The representation must have been made with a knowledge of the facts; 3. The party to whom it was made must have been ignorant of the truth of the matter; 4. It must have been made with the intention that the other party should act upon it; and 5. The other party must have been induced to act on it.

ID. — FACTS INSUFFICIENT TO STOP VENDEES OF LAND FROM CLAIMING TITLE THERETO. — The vendees of land executed notes for the purchase-money, but neither in the deed to them nor in the notes was a lien reserved for their payment. A small part only of the purchase-money was paid, and the vendees afterwards left the land, and the vendor resumed possession. After the purchase-money notes were barred by limitation, the vendor brought suit against the vendees, alleging their abandonment of the land, and praying a cancellation of the deed as a cloud upon his title. *Held*, that the defendants were not estopped by these facts from setting up their legal title to the land in controversy.

SUIT to remove deed as a cloud upon title. The opinion states the case.

W. J. Graham and H. L. Stone, for the appellants.

J. H. Jones and G. H. Gould, for the appellees.

GAINES, J. Appellees, on the twenty-third day of January, 1877, sold to appellant Bynum and one S. F. Menifee, who was the ancestor of the other appellants, and is now dead, the tract of land which is the subject-matter of this suit. For the consideration of the conveyance, the vendees executed six promissory notes, each for \$151.50; two being payable twelve, two twenty-four, and two thirty-six months after date, and all reciting that they were given for the purchase-money of a tract of land sold on the day of their date. The deed also recites the execution of the notes for the purchase-money, but in none of these instruments was the vendor's lien expressly reserved. The vendees went into possession, but in 1880 or 1881 Menifee abandoned his possession, and died in an adjoining county before the bringing of this suit. Bynum also removed from the land in 1883, and it seems very shortly thereafter appellees took possession through a tenant, and so held it until the time of the trial. They brought this suit to

remove the deed as a cloud upon their title, and obtained a judgment to that effect.

The first assignment of error is, that the court erred in overruling defendant's exception to plaintiffs' original petition and their trial amendment. In their statement under this assignment, counsel for appellants say "They [meaning plaintiffs] allege that the notes given for the land reserves a lien on it, but they make the notes a part of the petition, and the notes show for themselves that they contain no lien." But we find that although the petition refers to exhibits as having been made parts thereof, no such exhibits appear in record, and hence there is nothing upon the face of the petition as set out in the transcript to show that the allegation that the lien was reserved is not true. From the record before us we must hold that the exceptions to the petition were properly overruled.

We do not think it necessary to consider the other assignments in error. They raise the question whether the plaintiffs make out a case in their testimony which entitled them to a judgment for the land. The deed and notes introduced in evidence showed that no lien was expressly reserved for the payment of the notes. It was an executed sale, and the vendors having parted with the title had no right to claim a revision upon the failure or refusal of the vendees to pay the purchase-money. But appellees claim that, by the conduct of the vendees, appellants are estopped. They proved as to Menifee that he paid very little on the notes (not enough, the court found, to pay a reasonable rent on the land for the time he occupied it), and that he left it in 1880 or 1881. No witness testifies to any fact, showing satisfactorily why he left it. But he never returned, and died in another county. Bynum also paid very little of the purchase-money, and moved from the place to another about three miles distant, in the spring of 1883. He testified that he left it because "it was sickly," and that he had abandoned his claim to it. Appellee Harris testified that he talked with Bynum in the winter of 1886 and 1887, and that the latter said he had abandoned the place; but upon cross-examination said he was not certain that he may not have said he had left the place. He did not testify to any conversation with Bynum before he took possession. Baxter testified that Bynum told him just before the trial "that Menifee had abandoned the land, and that he could not pay for it, and had quit it." One McCord testified that Bynum said to him "that the place was sickly, and that he had

let it go back to Preston and Harris"; but upon cross-examination admitted that he did not remember that Bynum said that he had turned it over to Preston and Harris. This witness also said: "My impression was, that Bynum said he had abandoned the place, and had turned it over to Captain Preston, and the impression was made on me from the fact that Bynum said he had quit it, and the fact that Preston was in possession." This is in substance all the evidence bearing upon the question.

When Menifee left the premises, none of the notes were barred, but when Bynum left all were barred but the two last, and the theory of the appellees is, that by leaving the place the vendees induced them to believe that they had surrendered all their rights under the deed, and to repose upon that belief until the notes were barred, and that thereby an estoppel was created. But we fail to perceive any ground upon which this claim can be successfully maintained. Appellees are presumed to have known the law, and to be aware that a mere abandonment by the vendees would not reinvest them with title to land they had conveyed away; and it cannot be supposed that any prudent man would be induced by this alone to forego his remedies for the enforcement of his lien for the purchase-money. The conduct both of Bynum and Menifee is lacking in the essential elements of an estoppel. These are given in a leading text-book upon this topic as follows: 1. "There **must** have been a false representation or concealment of material facts; 2. The representation must have been made with a knowledge of the facts; 3. The party to whom it was made must have been ignorant of the truth of the matter; 4. It must have been made with the intention that the other party should act upon it; and 5. The other party must have been induced to act upon it": Bigelow on Estoppel, 484; see also *Steed v. Petty*, 65 Tex. 490; *Blum v. Merchant*, 58 Id. 400.

Now, in the case before us, there were no representations by the vendees, nor any silence on their part, when it was their duty to have spoken. Nor was there any act done or word uttered by them, or either of them, as shown by the evidence, which manifests an intention that it should be acted upon by their vendors. Neither of the vendees told appellants, or either of them, that they had abandoned the land because they could not pay for it; and that the vendors could take it back. It appears, therefore, that appellants assumed that their vendees had surrendered the land because they were not

able to pay the purchase-money, but the vendees did not authorize such an assumption by any declaration made by them. They are not shown to have made any declaration concerning the matter until the notes were barred. That the mere failure to pay the notes and the taxes on the land and removal from the premises would not bar their legal right, whatever the action of the owners, we think too plain for argument.

We know of no case in which this ground of action or defense has been sustained upon such a slender foundation. The case made by appellee is insufficient upon the authority of every decision cited by counsel to support it: *Love v. Barber*, 17 Tex. 317; *Williams v. Chandler*, 25 Id. 11; *Scoby v. Sweatt*, 28 Id. 714; *Page v. Arnim*, 29 Id. 53; *Mayer v. Ramsey*, 46 Id. 375. To these a number of later cases may be added: *Echols v. McKie*, 60 Id. 41; *Peters v. Clements*, 52 Id. 140; *Blum v. Merchant*, 58 Id. 400; *Grimes v. Watkins*, 59 Id. 133; *Grinnan v. Dean*, 62 Id. 218; *Steed v. Petty*, 65 Id. 490.

If the vendees after their abandonment had told a third person that they had surrendered all claim to the land to their vendors, and that the latter alone had the right to sell it, and acting upon these representations such person had bought of the vendors, then the vendees would have been estopped. But the abandonment of the land by them and the resumption of possession by their vendors would not constitute such an inducement as would justify a purchase from the vendors to claim this equity; and it seems clear to us the vendors themselves occupy no higher ground.

If appellees had shown that Menifee and Bynum notified them that they were unable to pay their notes, and that they had abandoned the property, and would no longer claim it, and had authorized them to take possession, and if the former relied upon this, and took possession and forbore to sue until the notes were barred, they may have had a better case. But that is not the case made in the record, and we do not deem it proper to decide it in advance.

The claim of appellants is unconscientious, and in any other than a legal sense unjust; and the case of appellees, though brought about by their own laches, is a hard one. But the law is inexorable, and it is our duty to declare it, and not to bend it so as to meet the abstract justice of the case.

For the error of the court in holding appellants estopped to set up their legal title to the premises in controversy, the judgment is reversed and the cause remanded.

ACTS AND DECLARATIONS CONSTITUTING ESTOPPEL IN PAIS: *Humphreys v. Finch*, 2 Am. St. Rep. 293, and cases collected in note 296.

ESTOPPEL FROM NOT GIVING NOTICE OF CLAIM OF TITLE: *Guffey v. O'Reiley*, 57 Am. Rep. 424, and note 429-433; *Anderson v. Hubble*, 47 Id. 394, and note 401. And see, as to what must appear in order that declarations or conduct of parties shall operate as estoppel in respect to title to real property, *Davis v. Davis*, 85 Am. Dec. 157; *Martin v. Zellerbach*, 99 Id. 365; *Miller v. Miller*, 100 Id. 538; *Hodges v. Eddy*, 98 Id. 612; *Weinstein v. Bank, ante*, p. 23.

ALSUP v. JORDAN.

[69 TEXAS, 800.]

PRACTICE. — ERRONEOUS EXCLUSION OF EVIDENCE FROM JURY IS NOT GROUND FOR REVERSAL of the judgment, where it manifestly appears from the whole case that the evidence, if admitted, could not have influenced the verdict.

DIVORCE. — VALIDITY OF DECREE OF DIVORCE IS NOT ASSAILABLE on the ground that the special district judge who tried the case, and rendered the decree, was the county judge of the county when the trial began. Although he be such an officer as is forbidden by the constitution to hold another office, his acceptance and exercise of the duties of another office would operate an abandonment of the office to which he had formerly qualified, and his act as special judge would be valid.

LIMITATION OF ACTIONS. — UNDER TEXAS REVISED STATUTES, ARTICLE 3222, TIME LIMITED FOR COMMENCEMENT OF CERTAIN ACTIONS DOES NOT BEGIN TO RUN against married women until the removal of the disability of coverture; and a married woman should not be denied the benefit of this provision, because the courts recognize her right to maintain actions for the protection of exempt property, when necessary, to enable her to protect herself against the acts of her husband and others.

EXEMPTIONS. — Terms "all household and kitchen furniture" may include a piano kept and used for the purpose of instructing the children of the family in music, if the statute places no limit on the value of the household and kitchen furniture which it declares shall be exempt.

Id. — WHETHER EXEMPTIONS FROM FORCED SALE EXTEND FURTHER THAN THEY OUGHT is for the consideration of the legislature, it being the plain duty of the courts to enforce the legislative intent, as manifested by the letter and spirit of the statute.

THE opinion states the case.

Drury Field and R. L. Hightower, for the appellants.

STAYTON, J. The appellee brought a suit for divorce against her husband, A. J. Jordan, in April, 1882, and obtained an injunction restraining her husband from selling the property which belonged to them, and from interfering with her management and possession of the homestead and other property. She was also given the control of their five children during

the pendency of the suit. On February 5, 1883, an order was made authorizing the appellee to sell all the personal property belonging to herself and husband to raise means to support herself and children. A decree of divorce was granted on September 13, 1884.

On January 29, 1883, the appellants obtained a judgment in a justice's court against A. J. Jordan, on which an execution issued February 10, 1883, and this was levied on a cow and two-year-old heifer, the only cattle owned by Jordan and wife, and also upon a piano owned by them. This property was sold under execution, and this action was brought by Mrs. Jordan to recover damages, actual and exemplary, on account of the sale of this property, which is alleged to have been exempted from forced sale.

The petition alleges that the property was exempt from forced sale, and charges that the appellants, knowing of this, and of the pendency of the suit for divorce and the orders made therein, against the protest of appellee, maliciously, and with intent to injure, vex, harass, and distress her, caused the same to be seized and sold under their execution. There was a verdict and judgment against the appellants for damages, actual and exemplary.

There is no complaint of the charge of the court, except that it informed the jury that the piano was exempt from forced sale if it was used by the plaintiff, or by her and her husband, as a part of the furniture of their home. In this connection the court instructed the jury "that the word 'furniture' includes a supply of necessary, convenient, or ornamental articles for a residence, and for the purpose of teaching their said children music thereon." There is no assignment of error presented which questions the sufficiency of the evidence to sustain the verdict, and it must therefore be assumed that the appellants concede the sufficiency of the evidence to authorize the jury to find that the material averments of the petition were proved.

"The defendants offered to prove by Henry Field, Esq., that he, as the legal adviser and attorney for defendants, went to J. G. Hazlewood, one of the attorneys of record for S. E. Jordan in the suit for divorce against her husband, A. J. Jordan, and inquired of said Hazlewood why he did not stop the sale of the property, the sale of which is complained of in this cause, to wit, the cow and yearling and piano, and that Hazlewood replied that 'we don't want the old property,' and

that this conversation was after the levy on said property was made, and before the sale, and that said witness communicated said statement of J. G. Hazlewood to S. A. Alsup, one of the defendants, before the sale of the property." This evidence was objected to, on the ground that it was immaterial, and did not bind plaintiff, and the objection was sustained.

Whether Hazlewood had authority to make such a statement or not would be important on the question of the right of appellee to recover actual damages; but, if he had not authority to bind appellee, it may be true that his connection with her business was such as would have made his statement admissible when shown to have been communicated to the appellants before the sale, for the purpose of illustrating the *animus* of the appellants in causing the property to be sold. However this may be, the uncontroverted evidence shows that, before the sale was made, the appellants were fully advised of the fact that Mrs. Jordan was unwilling that the property should be sold, when, if the testimony had been admitted, it could not have influenced the verdict. The testimony of the witness would tend to show that he, as the legal adviser of appellants, was of the opinion that the property was not subject to forced sale, and the inference is very strong that the inquiry made by him was for their benefit. If so, they ought not to have relied upon the statement of any one not known to have authority from Mrs. Jordan to speak for her. If it were erroneous to exclude the evidence, no injury could have resulted from this, for with full knowledge of the opposition of Mrs. Jordan to the sale the appellants caused it to be made. They also had actual knowledge of the proceedings in the divorce suit, the legal effect of which we will not consider on this appeal.

The decree divorcing Mrs. Jordan from her husband was objected to on the ground that the special judge who tried the case was county judge of Harrison County. If a special judge, within the meaning of the constitution, be such an officer as is forbidden to hold another office, then the acceptance and exercise of this office would operate an abandonment of the office to which he had formerly qualified, and the act of the special judge would be valid: *State v. Brinkerhoff*, 66 Tex. 46. We do not wish, however, to be understood to hold that a special judge is such an officer as is forbidden by the constitution to hold another office, for that question is not involved in this case.

This action was brought on September 29, 1885, and the appellants asked the court to instruct the jury, in effect, that under the facts in this case the statutes of limitation ran against Mrs. Jordan from the time the sale was made. This the court refused. Mrs. Jordan continued a married woman until September 13, 1884. The statute provides that "if a person, entitled to bring an action other than those mentioned in chapter 1 of this title, be at the time the cause of action accrues . . . a married woman, the term of such disability shall not be deemed a portion of the time limited for the commencement of the action, and such person shall have the same time after the removal of her disability that is allowed to others by the provisions of this title": R. S., art. 3222. The fact that the right of married women to maintain action for the protection of exempt property has been recognized by the decisions of this court, in cases in which the exercise of such a power became necessary to protect her against the acts of her husband and others, furnishes no reason why the plain language of the statute shall not be given effect.

If subsequently to the passage of the statute, to which we have referred, the legislature had expressly empowered wives, situated as was Mrs. Jordan pending the divorce suit, to institute suits such as this, we would not feel authorized to hold that such legislation, by implication, repealed the statute referred to. There is no such legislation, however.

The special charge referred to in the seventh assignment of error, in so far as it was applicable to the facts of the case, was embraced in the charge given, and no injury could have resulted from the refusal of the court to give it. The evidence of the appellants themselves would have forbidden a finding that they did not require the officer to sell the property; for when he proposed to release it, they threatened him with a suit for damages if he did so.

It is evident that the value of the piano entered into the verdict, and it is urged that the charge of the court in regard to its exemption was erroneous, and that, as matter of law, it was properly subject to forced sale. The statute provides as follows: "The following property shall be reserved to every family, exempt from attachment or execution, and every other species of forced sale for the payment of debts: . . . all household and kitchen furniture": R. S., art. 2335. The general definition of "household," when used as a qualifying word, is pertaining or belonging to the house or family, and it

is so evidently used in the statute under consideration, the purpose of which is to exempt articles belonging to a family. And in such a connection, the word "furniture" is one of very broad signification, and, according to lexicographers, embraces a supply of necessary, convenient, or ornamental articles with which a residence is equipped. The statute declares that "the ordinary signification shall be applied to words, except words of art or words connected with a particular trade or subject-matter, when they have the signification attached to them by experts in such art or trade, or with reference to such subject-matter": R. S., art. 3138.

The charge of the court gave to the words "household furniture" their ordinary signification, and if it went further, it was in the direction of restriction, in that it made the article in question, which may be exempt because ornamental, exempt if used for the purpose of instructing the children of the family in music. The words used in the statute are not words of art, nor of trade having a technical meaning, and when used without some qualifying word, we are of the opinion that there is nothing in the subject-matter to which they relate which forbids their being given the signification which the court below gave to them.

Looking to the entire article giving the exemption, it is evident that the legislature did not intent to limit the exemptions to such things as are necessities to the family. It exempts "the family library, and all family portraits and pictures." This will embrace the entire collection of books belonging to the family, without reference as to whether they are such as convey information necessary in the ordinary affairs of life, or such as merely minister to the pleasure or amusement of the family, or some of its members. It also exempts "one carriage or buggy"; vehicles convenient but not necessities in every family. In the case of *Tanner v. Billings*, 18 Wis. 163, 86 Am. Dec. 755, it was held that under the statutes of Wisconsin, exempting property from execution, a piano was not exempt. The statute, it seems, exempted specific articles of household furniture, and then used the language, "and all other household furniture not herein enumerated, not exceeding two hundred dollars in value."

In construing the statute, the court very properly looked to the character of the articles of household furniture specified, and said: "The class of articles mentioned in the statute in immediate connection with this general clause, which are

plainly necessary for a family, show that by this clause the legislature intended to indicate other articles of a like nature. And the limitation of the value to two hundred dollars, which is less than the usual cost of a piano, shows that these could not have had reference to that instrument."

The statute of this state now in force places no limit on the value of the household and kitchen furniture which it declares shall be exempt, although former statutes did.

In *Richardson v. Hall*, 124 Mass. 237, the words "household furniture," used in a will, were held to embrace bronzes, statuary, and pictures; and several English cases are cited which held that these words embraced articles about a home which are only ornamental. The matter of exemption of property from forced sale was deemed by the people of this state so important that they were not content to leave the matter to the discretion of the legislature, and they therefore placed in the constitution the provision that "the legislature shall have power, and it shall be its duty, to protect, by law, from forced sale, a certain portion of the personal property of all heads of families, and also of unmarried adults, male and female": Const., art. 16, sec. 49.

Whether the exemptions given go further than they ought to is for the consideration of the legislature; the courts have no duty or power in such matters other than to enforce such laws as the legislature may enact; and in arriving at the legislative intention as shown by words used, the courts must give to such words the signification the legislature has declared it intended them to have. None of the assignments of error presented show any reason why the judgment should be reversed, and it must be affirmed.

ERRONEOUS REJECTION OF EVIDENCE WHICH COULD NOT CHANGE RESULT IS NO GROUND FOR REVERSAL OF JUDGMENT: *Kisling v. Shaw*, 91 Am. Dec. 645; *Heyneman v. Dounenberg*, 65 Id. 519; and error in admitting evidence, if the same result must have been reached had the evidence been excluded, is no ground for reversal: *Ganson v. Madigan*, 82 Id. 659; *Sims v. Boynton*, 70 Id. 540.

COVERTURE PREVENTS RUNNING OF STATUTE OF LIMITATIONS AGAINST MARRIED WOMAN: *Wilson v. Wilson*, 95 Am. Dec. 194, and note 199; *Coxzens v. Farnan*, 27 Am. Rep. 470; *Castner v. Walrod*, 25 Id. 369.

EXEMPTIONS — WHAT THINGS EMBRACED IN TERM "HOUSEHOLD FURNITURE": *Montague v. Richardson*, 63 Am. Dec. 173; *Haswell v. Parsons*, 76 Id. 480; *Tanner v. Billings*, 86 Id. 755; *Towns v. Pratt*, 66 Id. 726; *Kenyon v. Baker*, 97 Id. 158, and note 161; *Rasure v. Hart*, 26 Am. Rep. 772; *Freeman on Executions*, sec. 231. In *Tanner v. Billings*, *supra*, the statute exempted certain specified articles "and all other household furniture" not exceeding

a certain value, and it was held that a piano of less than that value, which belonged to one who was not a teacher of music, was not exempt thereunder.

EXEMPTION STATUTES OUGHT TO BE LIBERALLY CONSTRUED in furtherance of the benevolent objects for which they were enacted: *Stewart v. Brown*, 93 Am. Dec. 578; *Gilman v. Williams*, 76 Id. 219, and note; but yet parties claiming their benefits must bring themselves at least within the spirit of their provisions: *Montague v. Richardson*, 63 Id. 173.

FULLER v. O'NEAL.

[69 TEXAS, 349.]

TRUSTS. — SALE OF LAND BY AGENT OF TRUSTEE PASSES NO TITLE TO PURCHASER when there is nothing on the face of the trust deed authorizing the trustee to appoint an agent to make the sale for him.

ID. — OFFICE OF TRUSTEE IS ONE OF PERSONAL CONFIDENCE, and cannot be delegated, unless authority so to do is expressly granted in the instrument from which he derives his powers. A trustee empowered to sell on non-payment of the debt to secure which the trust is created can no more absent himself while the sale is going on than he can make it at a time or place or for a character of consideration different from that authorized in the deed of trust.

MORTGAGE — TRUST DEED. — MORTGAGOR OR GRANTOR IN DEED OF TRUST HOLDS FULL TITLE, legal and equitable, to the land, subject to the lien created by the instrument for the payment of the debt it is given to secure.

EQUITY — PLEADING. — IN ACTION OF TRESPASS TO TRY TITLE, IF DEFENDANT HAS EQUITIES which entitle him to require the plaintiff to pay his debt before recovering the property, he should set them up in his answer; and he is not entitled to such affirmative relief under the plea of not guilty.

TRESPASS to try title. The opinion states the case.

Leake and Henry, and Kilgore, Lively, and Kilgore, for the appellant.

J. C. Kearby, and Kearby and McChesney, for the appellee.

WILLIE, C. J. This was an action of trespass to try title, brought by Mrs. O'Neal to recover of Fuller a lot of ground and the improvements thereon, in the town of Wills Point. To this action defendant pleaded a demurrer and not guilty. The plaintiff proved title in herself, and the defendant attempted to deraign title from her and her husband through a deed of trust executed by them to W. A. Williams, to secure a debt due from them to defendant, and a sale under said deed at which defendant became the purchaser.

When the deed from the trustee to Fuller was offered in

evidence, it was objected to on the ground that, by its own recitals, it showed that the trust sale was not made by the trustee named in the deed, but by another person purporting to act as the agent of the trustee, and for other reasons not necessary to mention. The objections were sustained by the court. A judgment having been rendered for Mrs. O'Neal, the defendant appealed, assigning no other error except the ruling of the court upon the admissibility of the deed. This ruling involves the question as to whether a sale by an agent appointed by such a trustee passes a good title in the property sold to the purchaser, when there is nothing on the face of the trust deed that authorizes the trustee to appoint an agent to make the sale for him. There was no such authority contained in this deed, and the trustee was absent when the sale was made. The office of trustee is one of personal confidence, and cannot be delegated, unless authority so to do is expressly granted in the instrument from which he derives his powers. The course marked out for the trustee to pursue must be strictly followed by him, for the method of enforcing the collection through such deeds is a harsh one.

The grantor of the power is entitled to have his directions obeyed, to have the proper notice of sale given, to have it to take place at the time and place, and by the person appointed by him. He gives these directions because he thinks that a sale made by the person selected, and under the circumstances stated, will be to his interest, and make his property produce the largest amount of money. Of the prescribed conditions, none is more important than that which requires that the trustee shall in person make the sale. He is chosen because of the confidence the grantor has in his integrity and discretion. The trustee, in making the sale, and during the time the property is under the hammer, is expected to protect the interests of the grantor, to see that no fraud is practiced detrimental to his interests, and that no improper bid is accepted, and that the property is not knocked off without giving fair opportunity for it to bring its reasonable value. Perhaps the agent selected by the trustee to attend to this important matter is not one to whom the grantor himself would have intrusted it. He has reposed confidence in the party selected by him, and that confidence cannot be transferred without his consent. The trustee can no more absent himself whilst the sale is going on than he can make it at a time or a place or for a character of consideration different from that authorized

in the deed. These views are so well supported by authority that it is unnecessary to further elaborate them: Perry on Trusts, secs. 402, 499, 602 m, 602 x, 779, 780; *Graham v. King*, 50 Mo. 22; 11 Am. Rep. 401; *Bales v. Perry*, 51 Mo. 451; Hill on Trustees, 175; *Powell v. Tuttle*, 3 N. Y. 396.

The act thus performed is not merely ministerial, such as is performed by a crier when the trustee is present directing and superintending the sale, but it requires an exercise of judgment and discretion in the matters mentioned, as well as in others. The failure to perform it is not such a defect in the execution of a power as will be aided by a court of equity. A court of equity will hardly interfere, in case of a trust created for the purpose of securing a debt, to assist the trustee in executing the powers conferred upon him, in a manner substantially and materially different from the mode prescribed by the grantor, and when his failure to obey the wishes of the grantor might have resulted in injury to the latter. The power was not, in this respect, directory, but of the strictest character, and can be exercised only under the circumstances prescribed in the instrument by which it is created.

It is said that the present instrument does not positively prescribe that the sale shall be made by Williams in person. No other meaning can be drawn from its language. It says that he shall advertise the sale to take place in the town of Wills Point, and shall execute deeds to the purchasers. No one else is authorized to make the sale. Williams is the only person who is clothed with any powers whatever in reference to the sale of the property, and it is clearly contemplated that he shall execute them.

It is also claimed that the legal title to the property was, by the deed, vested in Williams, and that Mrs. O'Neal's remedy is in equity, and that she cannot recover without doing equity by tendering the debt secured by the deed of trust.

It is now well settled by our decisions that the mortgagor or grantor of a trust like the present holds the title to the land, i. e., the full title, legal and equitable, subject to the lien created by the instrument for the payment of the debt it is given to redeem. It is not an open question, and need not be discussed: *Duty v. Graham*, 12 Tex. 427; 62 Am. Dec. 534; *Mills v. Traylor*, 30 Tex. 11. If, however, the appellant had equities which entitled him to require the plaintiff to pay his debt before recovering the property, he should have set them up in his answer. He was not entitled to such affirmative

relief under the plea of not guilty. Under this plea, a defendant may introduce anything applicable to the action of trespass to try title to defeat the title of his adversary; but "if he wishes to assert an independent, equitable right, not involved in the issue as to title directly in controversy, he should present the facts by proper averments": *Ayres v. Duprey*, 27 Tex. 604; 86 Am. Dec. 657; *Rippetoe v. Dwyer*, 49 Tex. 506.

To ask that the plaintiff be required to pay the debt which purported to be extinguished by the trust sale was to invoke the equitable power of the court for the relief of defendant. This could be done in an action of trespass to try title under our system of procedure, but not under the plea of not guilty, as it did not defeat the right of the plaintiff to recover, but admitted it, subject to the adjustment of equities between the parties. It is unlike the case of a mortgagor who seeks to recover property of the mortgagee rightfully in possession under a deed absolute upon its face. Then the burden of showing payment of the debt is upon the plaintiff, and he must do so as against the plea of not guilty, as under that plea the defendant has shown an apparently good title. Here the defendant sets up a deed void upon its face, which does not defeat the action, and does not entitle him to possession, and has no right to relief on the face of his title proper, and can obtain it only by a prayer that the plaintiff be required to pay his debt before recovering the property. We think that, in the state of the pleading, the deed was correctly ruled out, and the judgment is affirmed.

TRUSTEES ACCEPTING TRUST UPON TERMS AND CONDITIONS CREATING IT have no power to alter, change, or dispense with those terms and conditions: *Cassell v. Ross*, 85 Am. Dec. 270; *Huntt v. Townshend*, 100 Id. 63.

TRUSTEE WHO SELLS UNDER POWER must strictly pursue the terms of the instrument: *Powers v. Keuckhoff*, 97 Am. Dec. 281, and note. He cannot delegate his power to another, except it be to perform the mechanical parts of the sale, as to advertise, or act as auctioneer, etc.: *Gillespie v. Smith*, 81 Id. 328. Where a deed of trust authorized a trustee, "or his legal representative," to sell the property conveyed by the deed on default of payment of the debts for which it was conveyed as security, the power cannot be exercised by the administrator of the trustee, but only by his successor in the trust: *Warnecke v. Lemba*, 22 Am. Rep. 85.

PLEA OF NOT GUILTY IN ACTION OF TRESPASS TO TRY TITLE admits only such defenses as are applicable to that action: *Ayres v. Duprey*, 86 Am. Dec. 657.

MORRISON v. INSURANCE CO. OF NORTH AMERICA.

[69 TEXAS, 353.]

INSURANCE. — **HOLDER OF INSURANCE POLICY IS CHARGEABLE WITH KNOWLEDGE OF ITS CONTENTS**, in the absence of fraud, misrepresentation, or concealment, when he has an opportunity to examine it before acceptance.

ID. — **PLEADING IN WHICH PARTY SEEKS TO EXCUSE HIMSELF FROM OBLIGATION** to comply with the terms of an insurance policy, on the ground of ignorance of its contents, but not alleging fraud, misrepresentation, or concealment, is bad on special exception.

ID. — **AGENCY.** — **INSURANCE COMPANY IS CHARGEABLE WITH KNOWLEDGE OF EVERY FACT** of which its general agent has knowledge, and when the company fails promptly to repudiate the acts of such agent, it will be held to have ratified them, or to be estopped by its silence when it ought to have spoken.

ID. — **REINSURANCE.** — **ALTHOUGH POLICY OF INSURANCE PROVIDES** that it shall be null and void unless countersigned by the company's general agent, having power to "issue and cancel policies for it, make renewals and indorsements of other insurance when necessary," and also that the procuring of other insurance on the property, "not made known to this company, and consented to hereon," will avoid the policy, yet if other insurance was obtained, and such agent when informed thereof made no objection, but promised to indorse his consent on the policy, and afterwards made a written memorandum for renewal, with such reinsurance embodied therein, but did not indorse it on the policy, the company will be bound by its acquiescence in such acts of its agent; and this is so, although the policy stipulates that "agents of this company have no authority to bind the company in violation of any of the printed terms or conditions of insurance, as herein expressed; and no printed or written condition or restriction hereof, which by its terms may be subject to waiver, shall be deemed to have been waived, except by a distinct, specific agreement, clearly expressed in the body of the policy." Any condition in the policy which, under its terms, might have been waived in the body thereof, and not otherwise, must be deduced, within the meaning of this stipulation, a condition or restriction "subject to waiver," and to such only does the stipulation apply.

CONTRACT. — **ONE WHO HAS AGREED THAT HE WILL ONLY CONTRACT BY WRITING** in a certain way does not thereby preclude himself from making a parol bargain to change it. There can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing, and every such agreement is ended by the new one which contradicts it.

PLEADING. — **PLEADING SHOULD STATE FACTS**, and the averments of legal conclusions, drawn from the facts stated, are in no way necessary to the full presentation of the right claimed, and are properly stricken out on motion.

ACTION by A. M. and Dan Morrison against the Insurance Company of North America, on a fire policy for the sum of fifteen hundred dollars. The material facts appear in the

opinion. Verdict and judgment for the defendant, and the plaintiffs appealed.

Edwards and Fear, for the plaintiffs in error.

G. C. Groce, for the defendant in error.

STAYTON, J. Every policy-holder, in the absence of fraud, misrepresentation, or concealment, must be held to have knowledge of the contents of the policy when he has opportunity to examine it before he accepts it. To the pleading in which the appellants sought to excuse themselves from obligation to comply with the terms of the policy, on the ground that they were ignorant of its contents, not alleging fraud, misrepresentation, or concealment, exceptions were properly sustained. The printed terms and conditions embodied in the policy were in very fine print, but from the fac-simile found in the transcript it appears that they were legible, and it would be holding a very dangerous rule to assert that a party may be excused from being held to have knowledge of a contract to which he is a party, and under which he claims rights, by the fact that the instrument including the contract is difficult to read.

Every person having capacity to make a contract, in the absence of fraud, misrepresentation, or concealment, must be held to have known what the words used in a contract made by him were, and to have known their meaning; and he must also be held to have known and fully comprehended the legal effect of the contract which the words used made. Contracts for insurance do not furnish exceptions to these rules.

The appellants, by their pleadings, undertook to declare the legal effect of certain provisions in the policy sued upon, making a fac-simile of the policy a part of the pleading, and the court sustained an exception to so much of it. In this there was no error, for the pleadings of parties should state facts, and the averments of legal conclusions, drawn from the facts stated, are in no manner necessary to the full presentation of the right claimed.

The third section of the printed part of the policy contained the following provision: "The procuring of insurance on said property for more than its cash value, or the having of other insurance thereon, or any part thereof, valid or invalid, prior or subsequent, not made known to this company, and consented to hereon, will render this policy null and void." The

contract for insurance was made through one McCarty, the agent of the company at Ennis, Texas, and the policy, which was signed by the president and secretary of the company and by McCarty, provided "that this policy shall not be valid unless countersigned by said company's duly authorized agent at Ennis, Texas."

This agent of appellee was shown to have and exercise power to "issue and cancel policies for it, make renewals and indorsements of other insurance when necessary, and collect premiums." The appellee is a corporation, resident in the state of Pennsylvania, and incorporated under its laws. Such an agent was a general agent, whose knowledge was the knowledge of the company whose agent he was, and by whose acts, within the scope of his powers, his principal would be bound.

After the policy was issued, the appellants, without the previous consent of the agent, or any other person authorized to give the consent of the appellee, obtained insurance on the property covered by the policy in question. The defense was that this subsequent insurance, obtained without the consent of the company, evidenced by an indorsement on the policy, rendered it null. The appellants pleaded, and offered to prove that A. M. Morrison, one of the plaintiffs, immediately informed McCarty, defendant's agent, of the "other insurance" complained of; that he made no objection thereto, but promised at his earliest convenience to indorse such "other insurance" on the policy; that the notice was given for the purpose of procuring such indorsement; that plaintiffs relied on said agent's promise, and believed that he would perform every duty necessary for their protection; that afterwards, and just before their loss, McCarty arranged with them to renew the policy at its expiration, after being again informed of the amount of insurance they were carrying and the value of their stock; that he insisted upon making renewal; that he made a memorandum of the renewal in writing, but not on the policy; that he did not object to the amount of insurance carried by plaintiffs on their stock, but was eager to renew the policy at its expiration; that from McCarty's conduct they believed their policy to be in force up to the time of the loss.

The policy having been made an exhibit to the appellant's pleadings, the court sustained an exception to so much of the pleadings as set up those matters, on the ground that no consent of the agent to subsequent insurance, under the terms of

the policy, could be shown otherwise than by an indorsement upon it. The appellants filed a trial amendment, in which they alleged that the agent, since the policy issued, had been given other power than such as the policy gave, and that under this the acts of the agent pleaded would bind the company. There was no evidence, however, offered to sustain this last pleading, and because of this, the evidence above referred to was excluded, and the court directed the jury to return a verdict for the defendant. Under the provision of his policy which we have set out, and the evidence showing the nature of the agency of McCarty, if nothing further affecting the power of the agent was contained in the policy, the case of *Crescent Ins. Co. v. Griffin and Shook*, 59 Tex. 509, would be conclusive of the liability of the appellee under the facts alleged and proposed to be proved. We see no reason to doubt the correctness of the decision made in that case, which is well sustained by the cases therein cited, as well as by the following: *American Central Ins. Co. v. McCrea*, 8 Lea, 513; 41 Am. Rep. 647; *Carrugi v. Atlantic Fire Ins. Co.*, 40 Ga. 140; 2 Am. Rep. 567; *Piedmont and Arlington Ins. Co. v. Young*, 58 Ala. 476; 29 Am. Rep. 770; *Pierce v. Nashua Fire Ins. Co.*, 50 N. H. 297; 9 Am. Rep. 235; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 111; 28 Am. Rep. 535; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Planters' Mutual Ins. Co. v. Lyons*, 38 Tex. 253; *New Orleans Ins. Ass'n v. Griffin and Shook*, 66 Id. 232.

The policy, however, in its sixth printed section, contains, among many other declarations, the following: "Agents of this company have no authority to bind the company in violation of any of the printed terms or conditions of insurance as herein expressed; and no printed or written condition or restriction hereof, which by its terms may be subject to waiver, shall be deemed to have been waived, except by a distinct, specific agreement, clearly expressed in the body of the policy."

It is insisted that, under this, no act of the agent looking to consent or acquiescing in subsequent insurance could bind the company unless he indorsed his consent on the policy. The true construction of the provision in the policy last quoted is not entirely clear. It recognizes the fact that there are terms and conditions in the policy which may be waived, and others which may not be. It further recognizes the fact that such conditions as are therein referred to which may be waived are such as must be waived, if waived at all, by an agreement

entered into at the time the policy is executed; for it provides that such conditions or restrictions as are subject to waiver can be waived only by a specific agreement, clearly expressed in the body of the policy.

By the body of the policy, we understand to be meant the entire face of the policy in its orderly arrangement existing at the time it is delivered. Looking to the entire policy, and especially to that part of its third printed section which we have quoted, it could not be claimed that it was intended that the consent to subsequent insurance must enter into the body of the policy, for it provides that this consent may be given by indorsement made on the policy. If, however, the insured desired to have the right to obtain subsequent insurance without the consent of some one authorized to give it after the policy issued, then, under the sixth section, it would be necessary that this should be provided for in the face of the policy.

That this and like waivers to be made before or at the time the policy issued were what was intended is evidenced by the fact that the policy in question, as we understand it, on its face gave to the insured the right to obtain additional concurrent insurance to the amount of five thousand dollars without further consent.

Any condition in the policy which, under its terms, might have been waived in the body thereof, and not otherwise, must be deemed, within the meaning of the sixth section, a condition or restriction "subject to waiver"; and to such only, we are of the opinion, has so much of the sixth section as we have quoted any application. The first and third subdivisions of section 3 embrace many acts or matters which it is declared shall operate a forfeiture of rights under the policy, unless an express agreement to the contrary be made in the body of the policy, while the second subdivision of the same section, as well as the third subdivision, embrace many matters and acts permissive, if consent to their doing be given by indorsement on the policy.

The authority of the agent, McCarty, to have bound the appellee by indorsing consent to subsequent insurance is not questioned, and the sole ground on which liability is denied is, that although he may have consented, he did not evidence his consent by an indorsement on the policy. A provision in a policy which declares that "the procuring of insurance on said property for more than its cash value, or the having of other insurance thereon, or any part thereof, valid or invalid,

prior or subsequent, not made known to this company and consented to hereon, . . . will, under this policy, be null and void," is, in effect, but a provision that the person who has power to give consent must evidence this in the manner prescribed. The cases cited show that consent, not indorsed by writing on or in a policy containing such a claim, will bind the company, when established, as fully as would the written consent, when acted and relied upon by the insured.

A provision that an agent shall not have power to evidence his consent to subsequent insurance, except by a writing on the policy, he having the power to give the consent of the company, it would seem would no more make it imperative that the agent should give consent, if at all, in the manner prescribed, than does a general declaration declaring a forfeiture of all rights under a policy on account of named acts, unless the consent of the agent is given thereto by a writing upon the policy; and, therefore, no greater effect should be given to the first clause of that part of section 6 quoted, if it be applicable to consent to subsequent insurance, than should be given to that part of section 3 above set out. The ground on which insurance companies, under policies like that before us, are held liable for the acts of their agents done in the exercise of lawful power, but not in the manner prescribed by the policy, is that the agent represents the company, and through him they have knowledge of every fact of which their agents have knowledge, and by failure promptly to repudiate their acts, are held to ratify them, or to be estopped by their silence when they ought to have spoken. If the facts existed as appellants proposed to prove them, application for consent to subsequent insurance was made to the agent who had power to give it. This the company must be held to have known. He gave consent, but not in the manner prescribed in the policy. This the company must also be held to have known.

Subsequent insurance did not *ipso facto* annul the policy, but the company might elect to give it that effect, or might waive it. Having knowledge of the facts, it was the duty of the company to manifest its intention as to this promptly, and having failed to do so, it ought to be held to have waived the right to treat the policy as null, when it knew that by the act of its own agent the insured had been led to believe that the policy was in full force. It is not so much by force of the fact that the agent gave a verbal consent to the subsequent insurance that the appellee should be held bound, as because

the company itself must be held, having knowledge of what he had done, to have ratified the consent given by him, though it may not have been given in the manner prescribed by the policy. If the policy limited the power of the agent, it imposed no limitations on the power of the company itself, and, as said by the supreme court of Michigan, in considering a provision in a policy similar to those found in the policy before us: "The condition literally applied would prevent any unindorsed consent by the company itself, by instruction of its board, or by act of its officers, as effectually as by any one else. And the case seems to settle down to the simple question whether a person, who has agreed that he will only contract by writing in a certain way, precludes himself from making a parol bargain to change it. The answer is manifest. A written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it": *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 153; *American Central Ins. Co. v. McCrea*, 1 Lea, 524; 41 Am. Rep. 647.

This finds application in contracts to be implied from silence where the party to the contract ought to have spoken, as well as in express contracts. What the agent of the appellee did was within the scope of his powers, even if the manner in which he exercised those powers was not that pointed out by the policy; and the latter fact cannot relieve the appellee from notice of all the facts known to its agent. We may say, under the facts the appellants proposed to prove, as was said by the court of appeals of New York in a case including a like question: "We are also of the opinion that the defendant was bound on receipt of the notice of [the subsequent insurance] to immediately repudiate the act of the agent in giving such consent if it supposed he had acted without authority, or it must be held liable for the power he assumed to possess, upon the ground that it has acquiesced therein and authorized the plaintiff to rely thereon. It had no right to remain silent and suffer the insured to lay by and forego other insurance upon his property, and subject him to the hazard of eventual loss upon the assumption, which he was authorized from its silence to indulge, that the act of the agent was approved by it, and that there still remained in

him, notwithstanding [the subsequent insurance] a valid insurance upon his property": *Benninghoff v. Ins. Co.*, 93 N. Y. 503.

The court below erred in sustaining the exception to appellant's supplemental petition, and in excluding the evidence tending to show that the agent was notified of subsequent insurance, and agreed to the same, and promised to indorse his consent on the policy, as well as the other evidence offered in immediate connection with these matters. We are of opinion, however, that the appellee did not waive any right it may have by the objections made to the proof of loss, for in the first communication made to the applicants, in regard to the loss, the objection of subsequent insurance in excess of that allowed by the appellee was urged, and there is nothing in that communication which evidences an intention of the insurance company to waive any right it then had.

For the reasons stated, the judgment of the court below will be reversed, and the cause remanded.

GENERAL AGENT OF FIRE INSURANCE COMPANY HAS POWER to waive conditions in the policy inserted for the benefit of the company: *Kruger v. Western Fire Ins. Co.*, 1 Am. St. Rep. 42, and note.

OPEN POLICY OF INSURANCE MAY BE MODIFIED BY SUBSEQUENT PAROL AGREEMENT, although the policy provided that no condition should be waived except by specific indorsement on the policy: *Day v. Insurance Co.*, 57 Am. Rep. 416.

INSURANCE. — STIPULATION IN POLICY AGAINST OTHER INSURANCE, POLICY AVOIDED FOR VIOLATION OF: *Havens v. Home Ins. Co.*, 60 Am. Rep. 689; and see *Hutchinson v. Western Ins. Co.*, 64 Am. Dec. 218, and note on this subject 221; *Funk v. Insurance Association*, 43 Am. Rep. 216, and note 221.

INSURANCE. — AGENT'S KNOWLEDGE, WHEN ATTRIBUTABLE TO PRINCIPAL: *Beal v. Park Fire Ins. Co.*, 82 Am. Dec. 719, and note 722, 723.

PLEADING. — ALLEGATION OF DUTY OR LIABILITY IS OF NO AVAIL, unless the facts necessary to raise it are stated: *McCune v. Norwich City Gas Co.*, 79 Am. Dec. 278; *Hewison v. New Haven*, 91 Id. 718.

EVANS v. TEMPLETON.

[69 TEXAS, \$75.]

REGISTRATION. — OBJECT OF RECORDING DEED IS TO GIVE NOTICE TO CREDITORS and subsequent purchasers from the grantor of the grantee's title, and, except as to the matter of notice, an unrecorded title is as good as if recorded.

BONA FIDE PURCHASER. — PURCHASER WHO BUYS IN IGNORANCE OF PRIOR UNRECORDED DEED, not having paid the purchase-money in full, is not a *bona fide* purchaser, and can claim no equity arising from the alleged negligence of the prior purchaser in failing, after the destruction of his deed and the records of the county, to have his title established and his conveyance again recorded.

ADVERSE POSSESSION, NATURE OF, TO SET IN OPERATION STATUTE OF LIMITATIONS. — One who sells a lot to be used as city property, which at the time is inclosed in a field, cannot successfully set up the statute of limitations against the grantee merely because the latter fails to take actual possession, and permits it to remain in the original inclosure. To make the plea of limitation effectual in such case, the vendor must show some notorious act of ownership over the property distinctly hostile to the claim of the grantee.

ID. — TO RENDER POSSESSION ADVERSE, it must not only be actual, but also visible, continuous, notorious, distinct, and hostile, and of such a character as to indicate unmistakably an assertion of claim of exclusive ownership in the occupant.

C. C. Cummings, for the appellant.

C. M. Templeton, for the appellee.

GAINES, J. Appellee brought this suit in the court below against appellant and E. B. Brown, alleging in his petition that in 1873 the former conveyed to him a certain lot in the city of Fort Worth; that afterwards, in 1884, he again sold and conveyed the property to his co-defendant Brown; that his deed, duly acknowledged, was deposited for record in the office of the county clerk of Tarrant County, and together with the court-house of that county was destroyed by fire in 1876. It was also averred that the lot in controversy was sold and conveyed to Brown, in connection with another lot adjacent thereto, of the same size and value, for the consideration of \$2,000, of which Brown had paid, including interest, only the sum of \$560. It was further alleged that if plaintiff was mistaken as to the exact locality of the lot sold to him, then it was a lot of the same dimensions, the east boundary of which lies one hundred feet farther west than that of the lot he first described, and that the east half of this was embraced in the land sold to Brown. Plaintiff prayed for a recovery of the land so conveyed to him, and if this could not be had, then

that he have judgment against defendant Evans for its value. Defendant Evans pleaded a general denial, and the statute of limitations of two, three, five, and ten years. Defendant Brown answered specially, admitting the purchase of the two lots of his co-defendant, and the conveyance of them to him upon the terms alleged in the petition, and that he had paid of the purchase-money only the amount therein set forth. He prayed that in the event the court found plaintiff entitled to recover the land claimed in his petition, that he should have a judgment against his co-defendant, canceling his unpaid notes, and ordering that they be delivered up to him.

The case was submitted to the jury upon special issues, and they found, in substance, that defendant Evans did convey to plaintiff the lot first described in his petition; that Evans subsequently sold it to Brown on a credit of \$2,000, of which only \$560 had been paid, and that plaintiff's lot and the other lot conveyed to Brown were of the value of \$1,000 dollars each at the date of the sale to Brown and at the time of the trial. A judgment was accordingly rendered for plaintiff for the recovery of the lot described in his petition and in the verdict as against both defendants, and a decree entered that, when defendant Brown should pay his co-defendant a sufficient sum to bring his payments up to one thousand dollars and the interest thereon from the date of his notes, the notes should be extinguished, and that defendant Evans be enjoined from transferring said notes. From this judgment Evans appeals as against the plaintiff, but not against his co-defendant. Defendant Brown acquiesces in the result.

The second and third assignments of error complain of the refusal of the court to give charges asked by appellant. The instructions requested contain propositions which are erroneous, and for that reason alone were properly refused. Under the first, the jury would have been authorized to find against the plaintiff, if Evans had held adverse possession of the land for two years. Besides, that charge would have made the case to turn upon the question of plaintiff's negligence in failing, after the destruction of his deed and the records of the county, to take steps to have his title established, and his conveyance again recorded. There is no question of negligence in the case. The object of recording a deed is to give notice to creditors and subsequent purchasers from the grantor of the grantee's title. Except as to the matter of notice, an unrecorded title is as good as if recorded. Brown, not having

paid the purchase-money in full, and that which he paid not being sufficient to cover the value of the lot to which he got a good title, could not claim the equity of a *bona fide* purchaser. The charge in every aspect was erroneous and misleading, and was properly refused.

The second and fourth charges requested were upon the law of limitation as applicable to plaintiff's claim to recover of Evans the value of his lot in the event he failed to recover of Brown the lot itself. The recovery having been for the land, the refusal of this charge, even if correct, could not have operated to the prejudice of appellant. Hence, if error, it was harmless, and we need not consider the question presented by the refusal.

Treating the third request for instructions as sufficient to call for a charge upon the law of limitations, it presents, in our opinion, the only question in the case worthy of serious consideration. The defendant Evans having conveyed the land to plaintiff could not claim the benefit of the statute of either three or five years. He, however, testified that the lot in controversy had been inclosed and in his field ever since his conveyance to plaintiff in 1873 down to his sale to Brown in 1884; but that plaintiff's lot was not that claimed by the latter, but another which was situated near it. He also testified that both these lots remained in his inclosure after the conveyance, and that he also sold that which he admitted to be plaintiff's to one Mrs. Higby in 1884, "because he had written to plaintiff about selling it." It appears, therefore, that he had the same character of possession and exercised the same acts of ownership over the lot he claimed to be plaintiff's as over that which he claimed as belonging to himself. This clearly indicates that there was no such adverse possession in the case as would set in operation the statute of limitations against plaintiff's suit until the sale to Brown in 1884. One who sells a lot to be used as city property, which at the time is inclosed in a field, cannot successfully set up the statute of limitations against the grantee merely because the latter fails to take actual possession, and permits it to remain in the original inclosure. In order to make the plea of limitations effectual in such case, he must show some notorious act of ownership over the property, distinctly hostile to the claim of the grantee, and the adverse possession after this must continue for a sufficient length of time before suit to complete the statutory bar. The "possession must not only be actual, but also visible, continu-

ous, notorious, distinct, and hostile, and of such a character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant": *Satterwhite v. Rosser*, 61 Tex. 166, and cases cited. Appellant having failed to show adverse possession, it was not error to refuse a charge upon the statute of limitations.

The assignments which complain of the verdict and judgment are not well taken. The verdict of the jury is responsive to the issues presented, and finds all the facts of the case in favor of plaintiff, as alleged in his primary statement. This entitles him to the lot first described in the petition, and entitled Brown to be relieved from paying for the lot to which his title failed.

There being no error in the proceeding, the judgment will be affirmed.

REGISTRY LAW applies only in case where interest of creditor or subsequent purchaser can be affected with want of notice at the time he acts: *Voorhies v. Westervelt*, 3 Am. St. Rep. 315, and note 319; *Marshall v. Roberts*, 10 Am. Rep. 201; *Fox v. Hall*, 41 Id. 316; *Chamberlain v. Bell*, 68 Am. Dec. 260.

WHERE DEED IS ONCE DULY RECORDED, IT IS THENCEFORTH NOTICE to all the world, even though the record be totally destroyed: *Shannon v. Hall*, 22 Am. Rep. 146; *Alvis v. Morrison*, 14 Id. 117, and note.

POSSESSION TO BE ADVERSE MUST BE OPEN, NOTORIOUS, VISIBLE, CONTINUOUS AND HOSTILE, ETC.: See *Denham v. Holeman*, 71 Am. Dec. 198; *Worcester v. Lord*, 96 Id. 456, and note; *Schwallback v. Chicago etc. R. R. Co.*, 2 Am. St. Rep. 740, and note 744; *Lewis v. Schaunn*, 3 Id. 511.

TO SUSTAIN CLAIM OF BONA FIDE PURCHASER, the party must show that his purchase was upon a valuable consideration, and that the consideration was paid before he obtained notice of existing equities: *Blanchard v. Tyler*, 86 Am. Dec. 57; *Warner v. Whittaker*, 72 Id. 65, and note.

GULF ETC. RAILWAY COMPANY v. BENSON.

[69 TEXAS, 407.]

NEGLIGENCE — BURDEN OF PROOF. — IN ACTION AGAINST RAILWAY COMPANY TO RECOVER DAMAGES FOR PROPERTY DESTROYED BY FIRE, caused by sparks emitted from the company's engine, which ignited the dry grass on the right of way, the fire thence spreading to the property destroyed, the burden of proof is on the railway company to show that there was no negligence on its part in causing the fire. But this demand of the law as to burden of proof is satisfied when the company shows that it was using on the engine, at the time of the fire, the best mechanical appliances to secure safety from fire, that they were in good repair, and were operated by a skillful engineer in a careful manner.

Id. — ALTHOUGH RAILWAY COMPANY MAY ABSOLVE ITSELF FROM LIABILITY on account of the presumed negligence arising from the mere fact that fire caught from sparks emitted from its engine, by showing that its engine and spark-arrester were the best in use, yet, if the fire caught on its own right of way in dry grass which it allowed to accumulate, it is a question of fact for the jury to determine whether the failure to remove the inflammable matter was negligence.

NEW TRIAL. — APPELLATE COURT WILL NOT INTERFERE TO GRANT NEW TRIAL when there was evidence to sustain the verdict, unless there was manifest prejudice on the part of the jury.

ACTION for damages. The opinion states the case.

William McKnight, for the appellant.

COLLARD, J. This suit was brought by the appellee against the appellant in a justice's court of Bosque County for \$69.90 damages.

Plaintiff claimed that defendant negligently permitted grass and combustible material to accumulate on its right of way, which was ignited by sparks from its engine, and so burning his pasture grass and some posts. The justice of the peace rendered judgment for plaintiff, and the case was appealed to the district court (the county court having no civil jurisdiction), where it was tried by the judge, who rendered judgment for the plaintiff for \$69.90 and interest, from which this appeal is taken.

The judge filed his conclusions in the case, stating that the pasture was burned by sparks from defendant's engine, and that the fire originated by reason of the negligence of defendant in permitting combustible material to remain on the right of way.

The appellant complains of the conclusions and the judgment because,—1. The evidence does not show that defendant had any right of way; and 2. The evidence did not show that defendant negligently permitted grass or other combustible material to accumulate on its right of way.

The only evidence we find in the record relating to the subject of these assignments of error is that of the plaintiff. He says: The fire caught very near the cross-ties on the road within a few feet of the road-bed; it set the grass on fire near the cross-ties; it caught fire between the cross-ties on the road and the telegraph-poles. I do not know how far from the road-bed the defendant's right of way extends. The fire caught ten or fifteen feet from the cross-ties. It was agreed by the parties that plaintiff's witnesses would prove that the fire

caught from sparks emitted from the smoke-stack of a locomotive drawing defendant's passenger train on the eighteenth day of August, 1884, which set fire to and burned plaintiff's grass and fence-posts, and that the same locomotive in the same way set fire to Rutherford's pasture near that of plaintiff on the same evening, and that plaintiff's damage would be greater than the amount claimed. It was also agreed that defendant's witnesses would testify that said engine was at that time provided with the best spark-arrester yet known or discovered; that no spark-arrester has yet been invented that will entirely arrest all sparks; but that the sparks escaping from the arrester on this particular locomotive were necessarily very minute, and that the smoke-stack and arrester were daily inspected by competent mechanics and found to be in good condition and repair. These facts were not controverted, nor were the facts proved by plaintiff that the fire in question was caused by the emission of sparks from the same locomotive. Also that the engineer on this engine was thoroughly competent.

When plaintiff established the fact by uncontradicted evidence that the fire was so caused, and that he was thereby injured, our supreme court have decided that in such case the *onus* is upon defendant to show by affirmative proof that there was no negligence on its part in causing the fire; in other words, that a presumption would arise, in the absence of evidence to the contrary, that there was negligence on the part of the company: *International etc. R'y Co. v. Timmerman*, 61 Tex. 663. This doctrine is fully supported by the cases cited in 2 Wood's Railway Law, 1347, note 3. The evidence to defeat such *prima facie* case of negligence being peculiarly within the knowledge of defendant, the burden is upon it to produce it: *Id.*

Our supreme court having approved the doctrine laid down in the decisions of other states referred to in the note cited above, upon sound principle, we do not deem it necessary to enter into an elaborate discussion of the reasons of the law. This demand of the law as to burden of proof is, however, satisfied when the company shows by undisputed evidence that it was using at the time, and upon the very engine in question, the best and most approved mechanical appliances known and in use to prevent the escape of fire from its engine, and sparks from the smoke-stack, and that the same were in good repair and condition, and were operated by a skillful engineer in a careful manner.

If, then, the plaintiff can recover after such proof, it must be upon the ground that the defendant was negligent in other respects, as that, notwithstanding the approved fire-arrester, it was guilty of negligence in permitting the accumulation of combustible matter on its road or right of way as under the circumstances was dangerous, and would amount to negligence in the opinion of an unprejudiced jury, such as a man of ordinary prudence would not have committed in the management of his own affairs. While a railway company may absolve itself from liability on account of the presumed negligence arising from the mere fact that the fire caught from sparks emitted from its engine, by showing its engine and spark-arrester were the best in use, still if the fire caught on its own right of way in dry grass which it allowed to accumulate, it would be a question of fact for the jury to determine whether the failure to remove the inflammable matter was negligence. Such negligence might increase the danger to adjacent property, even though the best machinery was adopted: *Kellogg v. Chicago etc. R'y Co.*, 26 Wis. 228, 229; 7 Am. Rep. 69.

The law will not imply negligence from this fact. The question should be left to the jury: *Kesee v. Chicago etc. R'y Co.*, 30 Iowa, 80; 6 Am. Rep. 643 et seq.; *Burlington etc. R. R. Co. v. Westover*, 4 Neb. 274.

In this case, the court below found that the company was negligent in permitting combustible matter to accumulate on its right of way. The fire caught near the track,—about fifteen feet from it,—in the grass, and was communicated to plaintiff's pasture, and destroyed it. It was clear that the fire caught on defendant's right of way. While the conclusion of the court below may not have been the same we would have arrived at from the evidence as disclosed in the record, there was evidence to sustain it, and we are unwilling to disturb his conclusion, it having been repeatedly decided that the supreme court will not interfere to grant a new trial when there was evidence to sustain a verdict, unless there was manifest prejudice on the part of the jury. We are of opinion the judgment ought to be affirmed.

LIABILITY OF RAILROAD COMPANY FOR FIRE COMMUNICATED BY LOCOMOTIVE ENGINES: *Bassett v. Connecticut River R. R. Co.*, 1 Am. St. Rep. 443, and note 445, 446; *Grissell v. Housatonic R. R. Co.*, 1 Id. 138, and note 149; *Simmonds v. Railroad Co.*, 52 Am. Rep. 587.

NEGLECTANCE IS IMPLIED FROM ESCAPE OF FIRE FROM LOCOMOTIVE ENGINE, and the burden of proof is upon the railroad company, in an action against

it for such negligence, to show that the most approved mechanical appliances were used to prevent the escape of fire: *Bass v. Chicago R. R. Co.*, 81 Am. Dec. 254; compare *Ohio etc. R. R. Co. v. Shanefelt*, 95 Id. 504; *Fero v. Buf-falo etc. R. R. Co.*, 78 Id. 277.

IT MAY BE NEGLIGENT IN RAILROAD COMPANY to allow combustible matter to accumulate on its right of way: *Richmond etc. R. R. Co. v. Medley*, 40 Am. Rep. 734; and see *Pittsburgh etc. R. R. Co. v. Jones*, 44 Id. 334.

FEARS v. ALBEA.

[69 TEXAS, 437.]

SUBROGATION. — **THIRD PARTY IS ENTITLED TO BE SUBROGATED TO RIGHTS OF CREDITOR**, where, having an interest in the debt, he pays it in pursuance of an agreement between himself and the debtor, although the debt was not at the time due.

ID. — **MORTGAGES.** — **WHEN DEBT SECURED BY MORTGAGE IS PAID BY ONE UNDER NO OBLIGATION TO PAY IT, HE IS SUBROGATED** to the rights of the mortgagee in the mortgaged property, and will hold the title so acquired against subsequent encumbrances, although he took no formal transfer of the mortgage, and although he had also acquired the equity of redemption.

ID. — **IF PERSON ADVANCING MONEY TO PAY ON MORTGAGE, UNDER AGREEMENT** with the owner of the equity of redemption that it should be assigned to him as security for the money advanced, takes a discharge of the mortgage, he is still entitled to be subrogated to the rights of the mortgagee, and have the discharge vacated.

EQUITY WILL NOT PERMIT JUST RIGHTS OF PARTY TO BE LOST THROUGH MISTAKE or ignorance of fact, when such relief is not prejudicial to the rights of others.

PLEADING. — **INSERTION OF WRONG NAME IN ANSWER IS IMMATERIAL ERROR**, where, taking the answer altogether, it is perfectly apparent that the insertion of such name was a clerical error, and the name intended is obvious.

NEW TRIAL WILL NOT BE GRANTED ON GROUND OF SURPRISE, arising from the testimony of a witness being different from what counsel anticipated it would be, it not being shown that the witness intentionally deceived or misled counsel. Nor will a new trial be granted to enable one to obtain evidence which ordinary diligence could have procured on the trial, if desired, and especially if such evidence is merely cumulative.

ACTION of trespass to try title. The facts appear in the opinion.

Surratt and Taylor, for the appellant.

Anderson and Flint, for the appellees.

MALTBIE, J. The first question in this case is, whether *Mrs. Mary Albea*, who purchased the land in controversy from *J. M. Riviere* and wife subsequent to a deed of trust, executed

by Riviere to Eugene Williams on the eighth day of August, 1881, and not recorded, to secure a note for fifteen hundred dollars, made by Riviere, payable to James R. Richey, of the date of the trust deed, payable on the eighth day of August, 1887, and also subsequent to another deed of trust made by said Riviere to J. D. Wallace on the same land, dated on the sixteenth day of September, 1881, and recorded on the day following, to secure a note executed by said Richey to Mrs. M. E. Fears, on the same day as the deed of trust, and payable on the sixteenth day of September, 1882, having furnished the money to Riviere to pay off the note held by Richey, and the money, having been so applied by Riviere before the note fell due, can be subrogated to the rights of Richey in the deed of trust held by Williams for his benefit, without any agreement with Richey to that effect. The district court found as a fact that at the time C. P. Albea purchased the land for his wife, that it was agreed between Albea and Riviere that Riviere should take the money paid by Albea and pay off the note to Richey, and have it and the deed of trust on the land in dispute transferred to Mrs. Albea, and that the note was paid off by Riviere with the money so received before it became due, but that there was no transfer made by Richey, and that he had no knowledge of the agreement between Albea and Riviere in reference thereto.

The evidence shows that the money was not paid to Richey in person, he being absent at the time, but to his partner, who received it for him, and delivered the note and deed of trust to one Hearn, who advanced \$250 towards the payment on the Albea note, and held the Riviere and Richey note and deed of trust as collateral security; and that afterwards Albea paid Hearn the \$250, and that Hearn then delivered the note and deed of trust to Riviere, the debt having been paid in full, and that Riviere sent them by mail to Albea; but they were lost. In the case of *Fievel v. Zuber*, 67 Tex. 280, it is said that there are numerous decisions, quite a number of which are cited, which recognize the doctrine that if a third party (a volunteer) pay the entire debt in pursuance of an agreement between him and the debtor, upon his doing so he shall be subrogated to the creditor's rights, and that there are no known decisions to the contrary except in the state of Louisiana, where the matter is regulated by statute. We think this rule founded upon principles of equity and material right. Every man in this country has the right to dispose

of his property, or any interest he may own, however slight, in such property; and any rule that would prevent or clog the alienation of encumbered property at private sale would be very prejudicial to the debtor, inasmuch as it would result in subjecting this character of property to forced sale in many instances, when, if purchasers had the right by paying off prior encumbrances to be subrogated to the rights of the creditor holding such encumbrances, the sacrifice of property could often be prevented, while by such an arrangement subsequent creditors could not possibly be damaged.

It is said, upon high authority, that when a mortgage is paid by one who is under no obligations to pay it, although he does not take a formal assignment, he is subrogated to the rights of the mortgagee in the mortgaged property, and holds the title so acquired against subsequent encumbrances, although he had also acquired the equity of redemption. In such case, no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it. Even if a person advancing money to pay a mortgage, under an agreement with the owner of the equity of redemption that it should be assigned to him as security for the money advanced, takes a discharge of the mortgage, he is entitled to be subrogated to the rights of the mortgagee, and have the discharge vacated: 1 Jones on Mortgages, sec. 877, and authorities there cited. In general, any person having a subsequent interest in the premises which are not primarily liable for the mortgage debt, who pays off the mortgage, thereby becomes an equitable assignee of it, and may keep the mortgage alive, and enforce the lien for his own benefit: 3 Pomeroy's Eq. Jur., sec. 1212.

In this case, Riviere had the legal title to the property, and the right to pay off all encumbrances against it; having conveyed his interest to Mrs. Albea, she would be entitled to pay off any encumbrance against the land to protect her title. It is claimed that for the reason that the Richey mortgage was discharged of record, and that the debt was paid by Riviere before it became due, that Mrs. Albea could be subrogated to the rights of Richey in the property. It appears that the mortgage was discharged of record, by direction of Riviere, in 1885, for the purpose of having the title to other property embraced in the mortgage freed from the encumbrance, as stated by him; but at all events, it was done without the knowledge of Mrs. Albea, and equity would reinstate it for her benefit, for it will not permit the just rights of a party to be lost

through a mistake or ignorance of fact when not prejudicial to the rights of others. We are also of opinion that it can make no defense as to Mrs. Albea's right of subrogation, that the money was paid by the hand of Riviere, she having furnished it for that purpose; nor does it matter that the debt was paid before it fell due. She was no meddler, but a purchaser having rights in the property, and acted in the matter under a contract with Riviere. No one except Richey could object to the debt being paid before it fell due; and he does not complain. There is no charge that the debt was not valid. Mrs. Albea, at the time of the payment, did not know that there was any other lien on the property in existence, and Mrs. Fears was in no way injured or damaged by the paying off of the Richey mortgage; had it not have been paid, Richey would have been entitled to assert his claim to the extent that Mrs. Albea now is entitled to do. Richey's mortgage was but a security for his debt; and it would have been nothing more if it had been past due when paid, the legal title remaining in Riviere for all time until divested by a sale. We can see no reason, technical or substantial, why the payment, when made, was not effectual to invest Mrs. Albea with the rights of Richey in the property.

Under authorities hereinbefore referred to, the debt and lien of Richey was equitably assigned to Mrs. Albea, on account of her paying off the debt; and the fact that Richey had no knowledge of the payment being made by her, under the circumstances of this case, would not affect her rights in this matter.

It is insisted that the court erred in foreclosing the mortgage executed by Riviere to Richey without making them parties to the suit, the note of fifteen hundred dollars that the mortgage was given to secure being in issue; and also in not rendering judgment against Riviere for the amount of the note.

Appellants did not question the right of the court to determine the case by any exception to appellees' pleading, though the relief granted was prayed for in the answer. It was not claimed but that the debt to Richey was a valid obligation against Riviere, and against the land; nor was it denied that the debt was paid in the way, and by the persons, as claimed by appellees; that is, that Riviere procured the money from Mrs. Albea by a sale of the land in dispute, and that the payment was made by him with the money, for her benefit. The

effect of which would be to discharge the debt, as to Riviere, and subrogate Mrs. Albea to the rights of Richey in the premises, as the same existed at the time of the payment of his debt. No judgment, then, could be rendered against Riviere; and he, having parted with all title to the land by conveyance to Mrs. Albea, was not a necessary party to the suit; and Richey's debt having been fully paid, there was no necessity of his being made a party,—having no right and setting up no claim to the property. If the appellants had raised an issue by their pleading as to these facts, Riviere and Richey would have been necessary parties; but not having done so in the court below, they should not be heard to complain in this court.

Appellants assert that the court erred in not granting their motion for a new trial on the ground that they were misled and deceived by the following portion of defendant's answer, to wit: "That on the eighth day of August, 1881, said Riviere and wife executed to Eugene Williams, trustee, a deed of trust on said property, and two other pieces or lots of land in Waco, to secure James R. Richey in the payment of said Riviere note for fifteen hundred dollars,—with even date with said trust deed, and to become due on August 8, 1882. That afterward, on September 16, 1881, Riviere executed to J. D. Wallace a deed of trust on the same lots and other property to secure Mrs. M. E. Fears in the payment of Riviere's note for fifteen hundred dollars, due September 16, 1882, and that Mrs. Fears had full and actual notice of said first-named trust deed before the execution of the one to secure her; and in order to protect said Mrs. Fears from said first deed of trust, said J. M. Riviere did, by special arrangement with C. P. Albea, pay the said Richey said fifteen hundred dollars on the 15th of June, 1882. That when Albea purchased the property for his wife, it was agreed that Riviere should take the money paid by him and discharge the Richey debt, and have the note and deed of trust transferred to Mrs. Albea."

Appellants say that they were misled by that portion of the answer that charges that Riviere and Albea caused the Richey debt and mortgage to be paid off for the benefit of Mrs. Fears, and then permitting defendants to show that the payment was made for the benefit of Mrs. Albea. Taking the answer altogether, we think it perfectly apparent that the insertion of the name of Mrs. Fears in the position that it occupies in the answer was a clerical error, and that if coun-

sel were deceived and misled, that it was on account of negligence and want of ordinary care and attention on their part to the matter at hand.

It is also claimed that plaintiffs' attorneys were deceived and misled by their witness J. D. Wallace in reference to his testimony on a material issue, to wit, that they understood him to say that he would swear that Mrs. Fears had no actual notice of Richey's deed of trust when that to her was executed, and for that reason they went into trial without Mrs. Fears being present, by whom they could prove that fact. It is not shown that Wallace intentionally deceived or misled counsel, nor is it shown but that it was the fault of counsel that they misunderstood Wallace. He was their trustee who negotiated the loan upon the property for Mrs. Fears, and when default was made in the payment, sold it under her deed of trust for her benefit, from which it might be reasonably inferred that he was on friendly terms with her, and would not withhold any information about which he might be interrogated, or intentionally, at least, make a statement that would mislead. In his testimony he states that he negotiated the trade for Mrs. Fears; that he had no notice of Richey's deed of trust; that Mrs. Fears had nothing to do with the trade, left it all to him, and that he did not believe that she knew anything of the Richey claim, judging from all of the circumstances. We are at a loss to know how any one could testify any more definitely in reference to another's want of knowledge on a particular subject like the one at issue, unless it was a fact that Mrs. Fears was not in the country at the time of the negotiation; if that had been a fact, Wallace would have been able to testify to it. We do not think that counsel were justified in being deceived, misled, or surprised at the evidence of Wallace.

An additional reason why the court did not err in refusing to grant a new trial on the grounds urged is, that, in reply to plaintiff's motion, supported by the affidavit of Mrs. Fears, that she did not have notice of the Richey deed of trust at the time she acquired the deed of trust from Riviere on the property, defendants filed affidavits of Riviere and Albea stating that at the time of the trial Mrs. M. E. Fears was in Waco, at the house of J. D. Wallace, the trustee in her deed of trust, which was within three blocks of the court-house, which, not being contradicted, will be taken as true. It is thus shown that ordinary diligence could have procured the

evidence of Mrs. Fears on the trial, if it had been desired. Having taken the chances without it, the rules of law will not authorize the reopening of the case, for the purpose of making an experiment with her testimony added.

It is not important that C. P. Albea should, at the sale of the property by J. D. Wallace, under Mrs. Fears's deed of trust, have stated the grounds of his wife's claim to the property, or should have given notice of her claim at all, in view of the fact that the property was purchased by Mrs. Fears, and that she is charged with notice of Richey's claim before the deed of trust on the property was executed to Wallace. Waiving the question of diligence, the newly discovered evidence only tends to contradict C. P. Albea as to the grounds he stated that he claimed the property on, at the sale by J. D. Wallace, he having testified at the trial that he gave notice that it was the homestead of Riviere and wife, and that Mrs. Riviere had not signed the deed of trust, and that he had purchased Richey's claim, and claimed under that also,—the newly discovered evidence tending to show that he did not give notice of the latter claim. J. D. Wallace and Mrs. Fears's husband had each testified on the trial that Albea did not assert the latter claim at the sale; and the alleged newly discovered evidence would be cumulative, and would only contradict Albea on an immaterial issue, and did not authorize the granting of a new trial.

The twelfth assignment is, that there was error in finding that Mrs. Fears had actual notice of Richey's deed of trust, at the time she acquired her lien on the property. There was evidence before the district court that she had notice of it, though there was evidence tending to a contrary conclusion. It was the province of the court below to pass upon the credibility of the witnesses and the weight of the evidence, and we see no sufficient cause in this case to disturb the findings.

The last assignment is, that the court erred in refusing to sustain plaintiff's general demurrer to defendant's amended answer. The answer set forth allegations amply sufficient to authorize the admission of all the facts proven on the trial, and if the facts authorized the judgment, it follows that there was no error in overruling the general demurrer.

There is error in the judgment, however. Mrs. Fears's deed of trust was of prior date to the deed from Riviere and wife to Mrs. Albea, and was duly recorded at the time of the execution of the latter, and the land having been sold under said

trust deed and purchase by Mrs. Fears, her title was superior to that of Mrs. Albea, and the court should have ordered the land sold, and the proceeds applied first to the payment of the Richey note and interest, and the balance to Mrs. Fears, and the judgment is here now reformed in that respect; but as the judgment in this regard was not assigned as error, Mrs. Fears should pay the costs of this appeal, and we report that the judgment be reformed and affirmed.

SUBROGATION, STRANGER OR VOLUNTEER HAS NO RIGHT TO: *Mosier's Appeal*, 93 Am. Dec. 783, and note 789. But one secondarily liable is entitled, where he has paid the debt, to the benefit of any securities which the creditor may hold against the principal debtor: *Forest Oil Co.'s Appeal*, 4 Am. St. Rep. 584.

NEW TRIAL ON GROUND OF SURPRISE AT TESTIMONY OF PARTY'S OWN WITNESS IS MATTER OF DISCRETION ON PART OF COURT: See *Delmas v. Margo*, 78 Am. Dec. 516, where a new trial was granted on a showing that the petitioner's attorney had used due caution to ascertain what the witness would testify to, and that the witness deceived him. But in *McCluskey v. Gerhauser*, 90 Id. 512, it was held that if the result would have been the same, had there been no surprise, a new trial should be refused.

NEW TRIAL WILL NOT BE GRANTED FOR NEWLY DISCOVERED EVIDENCE which is merely cumulative: *Lawrence v. Ely*, 97 Am. Dec. 768, and note; *Hart v. Jackson*, 77 Ga. 493; *Smith v. Watson*, 82 Va. 712; *Booth v. McJilton*, 82 Id. 827; or which could have been previously discovered by the use of due diligence: *Richardson v. Farmer*, 88 Am. Dec. 129; *Allen v. Bond*, 112 Ind. 523; *Booth v. McJilton*, *supra*; for, as is said in *Erskine v. Duffy*, 76 Ga. 602, this ground for a new trial is to be tolerated rather than favored because of its liability to abuse, and its tendency to mislead.

CONTINENTAL NATIONAL BANK v. WEEMS.

[69 TEXAS, 489.]

BANKS AND BANKING — TRUSTS — TRANSACTION CREATING RELATION OF TRUSTEE AND CESTUI QUE TRUST. — In the course of dealings between a New York and Texas bank, the former was in the habit of discounting notes for, and of forwarding them, on maturity, to the latter, "for collection and return," with the understanding that the proceeds of such discount notes should be preserved by the Texas bank as the property of the New York bank, and returned to it as such. The Texas bank, having received notes from its New York bank correspondent "for collection and return of proceeds," would become, as to such collections, when made by it, a trustee for the New York bank, and its duty would be to remit the proceeds of the notes to the latter. The relation created by the transaction is that of trustee and *cestui que trust*, and not that of debtor and creditor.

Id. — IN SUCH CASE TRUST FUND IS NOT DIVESTED OF ITS CHARACTER AS SUCH by being placed by the collecting bank in its vaults, and there

mingled with its other moneys; and the collecting bank thereafter becoming insolvent, the trust would attach to whatever money remained in the bank vaults when the receiver was appointed.

ID. — ONE WHO RECEIVES MONEY OF ANOTHER IN FIDUCIARY CAPACITY, AND EXPENDS IT in payment of his own debts, does not thereby create a lien upon his entire estate for its repayment, but the trust estate must be clearly traced into specific property, in order that the *cestui que trust* may claim either the property itself or a lien upon it.

ID. — WHEN TRUSTEE MINGLES TRUST MONEY WITH HIS OWN, AND AFTERWARDS PAYS OUT to others, he is presumed to pay out his own money, so long as he retains sufficient to cover the trust fund.

BANKER HAS NO LIEN UPON FUNDS IN HIS HANDS FOR INDEBTEDNESS of a customer, in the absence of a contract for that purpose, either express or implied. And where notes are sent to a bank for discount, the proceeds to be placed to the credit of its correspondent, and the bank refuses to discount the paper, but pays drafts drawn by its correspondent in the belief that the paper had been discounted, it has no lien upon the paper for its reimbursement. In settling with a receiver of its correspondent in such case, the bank is properly chargeable with the moneys collected upon the paper, and with the value of so much of it as remained unpaid, to be set off by the amount of the drafts drawn upon it by its correspondent after the notes were forwarded for discount.

PRACTICE. — RECEIVER OF INSOLVENT CORPORATION HAS RIGHT TO RECONVENE AGAINST ONE WHO INTERVENES in a proceeding to which he is a party, and it is proper to allow him to set up all the rights of the corporation growing out of a continued course of dealing with the intervenor under one general agreement. And the fact that other suits were pending in another tribunal involving the subject of dispute, and to which the receiver was a party, when pleaded in abatement of the plea in reconvention, is not an answer to it.

Goldthwaite and Ewing, for the appellant.

Hutcheson, Carrington, and Sears, for the appellee.

GAINES, J. On the nineteenth day of December, 1885, William R. Baker, as president of the City Bank of Houston, and one of its largest stockholders, and the Houston Insurance Company, another stockholder, filed a petition in the district court of Harris County against certain of its creditors and other stockholders, alleging its insolvency, and praying for the appointment of a receiver and for the collection and distribution of its assets among the holders of claims against it, according to their respective priorities; and on the same day appellee Weems was appointed receiver in accordance with the prayer of the petition, and has since been acting under direction of the court in that capacity. By a course of dealing, kept up during a series of years by the insolvent corporation and the Continental National Bank of New York, the New York bank had discounted the paper of the Houston bank,

and just before it fell due had forwarded it to the latter "for collection and returns."

Immediately before its failure, the Houston bank had received a large amount of paper so discounted for it by the New York bank, and had collected it in part and placed the proceeds to the credit of the latter. For others of their notes the Houston bank had received renewals, which were discounted by other banks in New York, and the proceeds applied to the payment of its debts. On the third day of September, 1886, appellant intervened in the original suit, claiming to be a creditor of the City Bank of Houston, and claiming a priority of payment out of the assets in the hands of the receiver, of the amount due to it by reason of the collection and appropriation of the proceeds of the notes sent by it to the Houston bank. The receiver resisted the claim, denying complainant's right to priority, and answered further that the City Bank before its failure had sent to the Continental Bank several promissory notes for sums amounting in the aggregate to over twenty thousand dollars, to be discounted; that the latter refused to discount the notes, but retained them without authority, and had then collected some of them and were proceeding to collect the others. To this counterclaim complainant replied, setting up a lien upon the notes to secure the payment of a general balance due it from the City Bank at the time of its failure. Upon the trial of the issue so presented, the court gave judgment, disallowing the claim of priority, but allowing the claim of the Continental Bank as a general creditor, and awarding a recovery against it in favor of the receiver for the full amount of the notes claimed by him to have been converted by it, less about five thousand dollars paid upon drafts of the City Bank upon it after the paper went into its hands. The judgment further provided that the Continental Bank should deliver up the notes or their proceeds to the receiver within thirty days, and that, upon its failure to do so, the judgment against it should be charged against its dividends, and that the receiver should have execution against it for the balance. From this decree the Continental National Bank has brought this appeal.

The first assignment is in substance, that the court erred in deciding that appellant was not entitled to have the amount of the notes sent by it to the City Bank for collection paid in full from the assets in the hands of the receiver. The evidence shows that some of these notes, amounting to about five thou-

sand dollars, were collected by the City Bank and were mingled with its funds after being credited to appellant, and that others were renewed, and the renewed paper discounted in New York for account of the City Bank,—the proceeds going to pay its debts. The first question to be determined is, whether under the agreement and the course of dealing between the two, the collecting bank is to be decreed the trustee of the funds received by it upon the notes which were paid, and of the renewed obligations which were taken in lieu of those which were not paid. Before the trial an agreed statement of facts was signed by the counsel representing the parties, and filed among the papers in the case. The agreement appended to the statement is as follows: "The matters and facts set forth in the foregoing eight pages are, for the purposes of the trial of the above-entitled cause, admitted to be true and correct, and may be read in evidence upon the trial of said cause, the parties thereto reserving the right to introduce such additional evidence, not inconsistent with the foregoing, as may be desired." The agreed statement contains the following paragraph: "That in the course of dealings between the City Bank and complainant, the latter was in the habit of discounting notes for the City Bank and of forwarding the same on maturity to the City Bank for collection and return, with an understanding that the proceeds of such discount notes should be preserved by said City Bank as the property of the complainant, and returned to it as such." The agreement further shows that the notes last referred to were received by the City Bank "for collection and return of proceeds."

We think these facts settle the question of trust in the affirmative. If the securities had been sent for collection merely, the proceeds to be credited to the New York bank, it is clear that after their collection the relation of debtor and creditor would have subsisted, and the latter would have no claim upon the funds. But by the understanding between the banks and the actual transaction between the parties as shown by the agreed evidence, a special agency was created, and the city bank had no authority to hold and credit the proceeds of the notes, but was bound to remit them immediately to its correspondent. This principle was clearly recognized by this court in the case of *City Bank of Sherman v. Weiss*, 67 Tex. 331, and is sustained by the great weight of authority, as appears from the citations in the opinion in that case.

But it is insisted by counsel for appellee that there is other

evidence in the record, not inconsistent with the agreement, which shows that the relation of debtor and creditor, and not that of trustee and *cestui que trust*, was created by the transaction. We think, however, that any evidence to show this fact in the face of the explicit statement in the admitted proof would be inconsistent with the agreement, and should have been disregarded by the court, whether objected to or not. But we do not regard the evidence relied on as being in conflict with that in the agreed statement. The receiver, who was cashier of the insolvent bank for many years previous to its failure, testified to the effect that in previous transactions of a like character it had been the habit of his bank to collect and credit the proceeds of the discount notes sent to it for collection. But appellant showed, on the other hand, by the testimony of its president, that in discounting paper for its customers at a distance, it was the custom to charge interest after the maturity of the paper to allow for the transmission to it of the proceeds after collection as well as exchange on the amount, and that in order to avoid these charges, the City Bank agreed to keep with the New York bank sufficient funds to meet the discounts as they matured, and that in all previous transactions this promise had been complied with. As long as the City Bank kept with its correspondent a sufficient sum to cover the amount of the discounted paper as it fell due, it had the right to the proceeds when collected, for it had then virtually taken up the securities. We do not see how the conclusion can be drawn from this, that it was entitled to credit its collections when it had no funds in the hands of the New York bank to make good its account, as was shown to be the fact in this particular transaction.

Had appellant permitted this, it might as well have extended credit to the Houston bank in the first instance without security, which the testimony shows it was very careful to avoid. It may be inferred from the receiver's testimony that his bank did not always have funds with its correspondent to cover its discounts at maturity. But he also testified that in every instance its account was immediately made good. As this was all the appellant could have legally demanded, it is not seen that the fact of his crediting the proceeds of the discounted notes returned for collection in such cases could have affected appellant's right as to future cases, under their express agreement, or under the restrictive indorsement made upon the notes in the particular instance now under consideration.

We think therefore that when the City Bank collected these last notes, it acted in a fiduciary capacity, and received the proceeds in trust for the Continental National Bank, and that it was its duty to remit them to the latter. This brings us to the further question whether, under the circumstances of this case, they were divested of their character of trust funds when they were placed by the collecting bank in its vaults and there mingled with its other moneys. It is a principle of equity long recognized and applied that when one who is intrusted with the money of another invests it in property, the *cestui que trust* may follow the funds, and fixing upon the property the character of the original trust, may claim it as his own: *Ryall v. Rolle*, 1 Atk. 172; *Scott v. Imman*, 4 Wells, 400; *Burdett v. Willett*, 2 Ver. 638. But in an early case it was said: "But if the factor have money it shall be looked upon as the factor's estate, and must first answer the debt of a superior creditor; . . . for in regard that money has no ear-mark, equity cannot follow that in behalf of him that employed the factor": *Whitcombe v. Jacob*, 1 Salk. 160. The idea thus suggested seems long to have prevailed in the courts of England. But at a later day a different doctrine has been established in these courts: *Taylor v. Plumer*, 3 Maule & S. 562; *Pennell v. Deffell*, 4 De Gex, M. & G. 372; *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; and has generally been applied in the courts of last resort in this country in the more recent cases: *National Bank v. Insurance Co.*, 104 U. S. 54; *Brocchus v. Morgan*, 5 Cent. L. J. 53 (Tenn.); *People v. Rochester Bank*, 96 N. Y. 32; *Harrison v. Smith*, 83 Mo. 210; 53 Am. Rep. 571; *Stoller v. Coates*, 88 Mo. 514; *Peak v. Ellicott*, 30 Kan. 156; 46 Am. Rep. 90.

The rule thus followed in the cases last cited we think founded upon the better reason. Where the trustee kept the fund separate, and the original money was capable of being identified, there never was any question. The *dictum* above quoted is not understood as having been applied to such a case. It is where the trustee has mingled the trust money with the mass of his other funds that the difficulty arises. It may be that when the entire mass is once paid away, the right to claim a trust in any money or property is forever lost. But if, as in the present case, throughout all the trustee's dealings with the funds so mingled together, he keeps on hand a sufficient sum to cover the amount of the trust money, we think it capable of demonstration that the trust should attach to the

balance that is found to remain in his hands. Let us take the case before us for an illustration. It is shown by the evidence that after the bank received the money, amounting to about five thousand dollars, its cash assets were never reduced below the sum of six thousand dollars until they went into the receiver's hands. Even admitting that, in course of its transactions, this identical money was paid out by the bank to its uttermost farthing, yet we know that every dollar so expended left its representative and exact equivalent in the vault from which it was taken; and that, when again the money so left was expended, it left in turn its equivalent behind it. We see, therefore, that whatever changes may have taken place in the funds from the receipts and expenditures of the bank, the balance left at the date of its failure was the result of the proceeds of the notes to the extent to which such balance was thereby increased; and that the cash which went into the hands of the receiver should be deemed the representative of those proceeds, and impressed with the trust character which pertained to them. The equity would have been no stronger if the City Bank had used appellant's money in the purchase of bonds or other securities, which were found in its vaults and identified, and if appellant were now seeking to recover the securities so bought.

For the reasons given, we are clearly of the opinion that appellant was entitled to priority of payment for the proceeds of the notes collected by the City Bank. But we think that the claim for full payment of the notes renewed and rediscounted by it stands upon a very different ground. The agreed evidence shows that these renewed obligations were indorsed by the City Bank, and deposited as collateral with banking houses in the city of New York, and were paid to the holders either in whole or in part. As to the one which was only partially paid, the agreement recites "that said renewal note to the amount of \$1,250 went to pay the debt of said City Bank, and benefited its estate accordingly." As to the other two, the language in reference to the disposal of the proceeds is a little different, but we presume it means the same thing. We therefore deduce from the admitted facts that with the proceeds of the notes now under consideration obligations of the insolvent bank were discharged, and that no other benefit accrued to its estate. Now, then, the question is, Has the appellant a lien upon the general assets in the hands of the receiver for the proceeds so appropriated? We think not. To

hold the affirmative of this proposition would be to declare that every one who receives the money of another in a fiduciary capacity, and expends it in the payment of his own debts, thereby creates a lien upon his entire estate in favor of the owner of the money so expended. But this is clearly contrary to the doctrine of constructive trusts. The true rule is, that the trust estate must be clearly traced into other specific property, in order that the *cestui que trust* may claim either the property itself or a lien upon it. This is the doctrine uniformly applied in the older cases, and laid down by the text-books upon the law of trusts: *Perry v. Phelps*, 4 Ves. 107; *Lewis v. Madocks*, 17 Id. 48; *Taylor v. Plumer*, 3 Maule & S. 562; *Pennell v. Deffell*, 4 De Gex, M. & G. 372; *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; *Pharis v. Leachman*, 20 Ala. 662; *Noble v. Andrews*, 37 Conn. 346; 2 *Perry on Trusts*, secs. 885 et seq.; 2 *Story's Eq. Jur.*, sec. 1258; 2 *Pomeroy's Eq. Jur.*, sec. 1051.

We have a line of decisions in our own court which we think have an important bearing upon the question before us. It is held that the wife may follow through all its mutations the proceeds, in the hands of the husband, of her separate estate converted by him, and claim the property into which they have been invested. But at the same time it has been repeatedly decided that, to enable her to do so, the proceeds must be clearly and distinctly traced: *Rose v. Houston*, 11 Tex. 324; 62 Am. Dec. 478; *Chapman v. Allen*, 15 Tex. 278; *Love v. Robertson*, 7 Id. 6; 56 Am. Dec. 41; *King v. Gilleland*, 60 Tex. 271; *Glasscock v. Hamilton*, 62 Id. 143. This results from an application of the doctrine of constructive trusts to the separate property of the wife in the hands of the husband. The principal, where money has been misapplied by his agent, occupies with us no higher ground than the married woman whose husband has misappropriated hers; and our courts have never held that the wife, in the latter case, is entitled to priority of payment out of the husband's estate as against his general creditors. This is shown by the case of *Richardson v. Hutchins*, 68 Id. 81, in which the wife recovered a large judgment against her husband's executor for her separate property, used by him in the payment of his debts, but recovered only as a general creditor.

The appellant's claim for priority as to the funds which went into the vaults of the bank also has a materially different effect upon the rights of other creditors from the claim we now have

under consideration. As to the former, we have attempted to show that it clearly appears that the direct equivalent and substitute for the proceeds of the notes collected by the City Bank went into the hands of the receiver. The authorities also hold that where the trustee mingles the trust money with his own, whenever he pays out (leaving enough to cover the trust fund), he is presumed to pay out his own money: *Knatchbull v. Hallett, supra*; *National Bank v. Insurance Co., supra*. Upon whichever ground we put it, the proceeds of the collected notes are traced into the bank vault, and their specific substitute found there and distinctly pointed out; and it works no injury to the general creditors to require the receiver to pay back money which never belonged to the bank. On the other hand, to allow a like priority for payment for the conversion of renewed notes would be to diminish the assets which the insolvent bank both legally and equitably owed to repay trust money which merely went to pay its debts. These payments may have gone to benefit its estate in one sense, but they did not contribute to swell the assets.

The decisions relied upon by appellant's counsel to support their position upon this question can hardly be deemed applicable to the facts of the present case. It remains to notice them briefly.

The case of *Brocchus v. Morgan* and of *National Bank v. Insurance Co., supra*, sustain appellant's claim of property for the proceeds of the collected notes, but are not authority upon the present question. In *Peak v. Ellicott*, 30 Kan. 156, *People v. Bank*, 96 N. Y. 32, *Harrison v. Smith*, 88 Mo. 210, *Stoller v. Coates*, 88 Id. 514, the trust funds were traced directly into the hands of the unfaithful agents, and went to increase their assets, if they did not appear, as in the case of the renewed notes now under discussion, to have been applied merely to the payment of debts. So, also, in *McLeod v. Evans*, 68 Wis. 401. There the draft, which was held to have been received in trust, was wrongfully sent by the banker to a correspondent, was collected by the latter, and its proceeds drawn out by the fiduciary on his own checks. In these cases, the doctrine has been so extended as to give priority from the general assets of the bank, on the ground that these assets have been swelled by the trust funds, although it was not shown that a sufficient amount of cash remained on hand to cover the latter. With the greatest deference to the courts who decided these cases, we are constrained to differ with them upon

this point, and to hold that in order to fix the trust upon any part of the assets, the particular property into which the trust may have been converted must be pointed out with at least practical definiteness and certainty.

Appellant next complains of the action of the court below in charging it with the notes sent to it by the City Bank for discount. The facts in regard to this matter are in brief: The City Bank sent the notes to the appellant to be discounted, and to have the proceeds placed to its credit according to a previous course of dealing between them. Appellant refused to discount the paper, and so notified its correspondent, but before the note was received by the latter, not doubting that the paper would be discounted, it drew upon appellant to the amount of about five thousand dollars. Appellant paid these drafts, relying upon the notes for reimbursement. It is now contended that it has a lien upon this paper for the payment, not only of the five thousand dollars so paid, but also for its general balance on account against its correspondent. This proposition cannot be maintained. It is frequently said that a banker has a lien upon the funds in his hands for the indebtedness of his customers; and it is argued that the rule applies unless there is an agreement to the contrary. But we understand the rule to be, that in order to give such lien, there must be a contract for that purpose, either express or implied. "The credit must be given on the credit of the securities or valuables either in possession or expectancy: *Russell v. Had-duck*, 3 Gilm. 233; 44 Am. Dec. 693. This is the extent of the banker's lien": *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; see also *Jarvis v. Rogers*, 15 Mass. 389; *Lucas v. Dorr-ien*, 7 Taunt. 279. In the case last cited a bond was presented to a banker by his customer as collateral for a loan, which the banker declined to accept, and it was casually left with him. It was held he had no lien upon it. So in this case the appellant, having refused the paper, had no right to hold it, and should have returned it. Having failed to do so, it has no lien except for the amount of the drafts paid, after the paper was received.

We think, however, the court erred in rendering judgment against appellant for the full value of the notes, although it decreed that the judgment might be satisfied by turning over to the receiver such as had not been collected, together with the proceeds of those which had been paid. A proper judgment would have been to charge appellant in the account with

the moneys collected upon the paper and with the value of so much of it as remained unpaid, to be set off by the amount of the drafts drawn upon the appellant by the City Bank after the notes were forwarded for discount.

We think what we have said sufficient to dispose of the leading propositions in the case. The other questions presented relate mainly to the right of the receiver to reconvene in the action brought against him in the court below. We are of opinion that although this proceeding was an intervention in another suit, and was a mere outgrowth of the original action, yet appellant having sought the jurisdiction of the court to establish equities against the estate in the hands of the receiver, it was proper to allow the latter to reconvene and set up all the rights of the insolvent corporation growing out of a continued course of dealing under one general agreement. It was not error for the court to adjust the equities between the two banks, and to state the amount, and to give judgment for any balance found in favor of the insolvent bank. The fact of other suits pending in another tribunal upon some of the notes, to which the receiver was a party, and in which the title was being contested, pleaded in abatement of the plea in reconvention, was not an answer to it. All parties at interest being before the court, this case was a proper proceeding in which to settle all matters in dispute between appellant and the receiver growing out of the transactions between the two banks. Upon the rendition of a judgment against the complainant for the value of the notes in this suit, its title to them would become perfect, and there would exist no obstacle to the prosecution of the suits for their collection which it had already instituted.

For the errors pointed out, the judgment will be reversed and the cause remanded, with instructions to the lower court to hear evidence as to the value of the notes sent to appellant for discount and not discounted at the date of the filing of the appellee's plea in reconvention, and to charge appellant with such value instead of the face value as in the former judgment, to allow appellant's claim for priority of payment out of the assets in the receiver's hands to the amount of the notes sent to the City Bank for collection, and collected by it, but not for those renewed and rediscounted, and in all other respects to state the account as before, and to give judgment accordingly.

LIEN OF BANKER UPON BILLS INDORSED FOR COLLECTION BY CORRESPONDING BANK is fully treated in the note to *Masonic Sav. Bank v. Bangs*, 4 Am. St. Rep. 202-204.

LIABILITY OF PERSON ACTING IN FIDUCIARY CAPACITY FOR LOSS OF FUNDS: *Coffin v. Bramlitt*, 97 Am. Dec. 449. Trust funds must be kept separate from private funds of the trustee, or he will be liable in case of loss: *Id.*, and note 455; and see *Whitney v. Foy*, 78 Id. 236, and note 238.

McCULLOCH v. McCULLOCH.

[69 TEXAS, 682.]

DIVORCE. — HUSBAND'S PETITION TO HAVE MARRIAGE CONTRACT ANNULLED, because his wife gave birth to a fully developed child so soon after marriage as to render it certain that it was begotten prior to marriage, will not be granted, unless evidence is produced by him sufficient to overcome the legal presumption that he is the father of the child.

SUIT for divorce. The facts appear in the opinion.

Cooper and Moore, for the appellant.

WILLIE, C. J. This is a suit for divorce brought by the appellant against the appellee, he alleging that he was married to her on the 4th of March, 1886, and that they lived together as man and wife till the 30th of August thereafter, and that on the 20th of June, 1886, three and one half months after their marriage, she gave birth to a fully developed child, and that he did not know until its birth but that it was his child. He claimed that the fact of her pregnancy was not made known to him by his wife before their marriage; that she had thereby perpetrated a fraud upon him; and that her condition at marriage was an impediment that rendered the contract of marriage void. The marriage, and birth of a seven or eight months' child within three and a half months thereafter, were proved; and it was shown by two witnesses that they were present at the marriage and did not notice that the appellee was pregnant, and it was shown that the appellant lived with her as a husband until some time after the birth of the child, and then left her; but, upon leaving, tried to persuade her to go with him.

The court below refused the divorce, and the plaintiff appealed. There was no proof as to who was the father of the child, and in such cases the presumption is, that it is the child of the husband: *Reynolds v. Reynolds*, 3 Allen, 610; *Hemmenway v. Towner*, 1 Id. 209; *Phillips v. Allen*, 2 Id. 453. This

presumption should be overcome by some proof to the contrary; but in this case the evidence tended rather to strengthen the presumption. The appellant and appellee associated together for a year before the marriage, and during a portion of the time were engaged to be married. There is no evidence to show that she kept company with any other man during that period, or that any one else was suspected of improper intimacy with her. After the marriage, too, the appellant lived with her as a husband for a considerable period, during which he must have known that she was with child, and must have known, too, that it had been begotten before the marriage. Yet he made no complaint or inquiry as to her situation, but acted in all respects as the father of the child would have done under like circumstances. Continuing to acknowledge such a person as his wife was almost proof positive that the child was his own, or that he believed and had good reason to believe this to be a fact. It is true that the appellant alleges that because of his youth and inexperience he did not know anything about such matters, and did not know that the child was not his until after it was born. But there is no proof on this subject; and the presumption from the allegation itself is that he believed the child to be his until its appearance convinced him to the contrary. But the evidence showed that he tried to persuade his wife to go and live with him after the child was born, which tends to show that he still believed it to be his own.

It is settled law that the husband cannot have the marriage annulled because the wife was with child by him at the date of the marriage. If a condition of pregnancy at that time is, under any circumstances, an impediment to marriage, it must be because it will impose upon the husband a spurious offspring: *Reynolds v. Reynolds, supra*. If it on the contrary yields him as the first fruits a child of which he is the father, the contract cannot be annulled, as its object is in no wise defeated. All the rights and privileges to which the husband is entitled are secured to him, and he cannot complain of the consequences of his own misconduct, especially when it has done him no injury. These principles are abundantly supported by authority, and need not be further elaborated: See preceding authorities; also *Long v. Long*, 77 N. C. 304; 24 Am. Rep. 449.

The presumption, strengthened by proof, being that the appellant was the author of the condition of the wife at mar-

riage for which he seeks to annul it, and no proof to the contrary having been produced, we think he showed no grounds for divorce, and the court below properly refused to grant his petition. The judgment is affirmed.

EVERY REASONABLE PRESUMPTION IS INDULGED IN FAVOR OF LEGITIMACY OF CHILDREN, when called into question: *Johnson v. Johnson*, 77 Am. Dec. 323; *Dennison v. Page*, 72 Id. 644; *Wright v. Hicks*, 60 Id. 687; and to repel this presumption, the evidence must be clear and positive: Id.; and see *Wright v. Hicks*, 56 Id. 451.

MAN WHO MARRIES WOMAN KNOWING HER TO BE PREGNANT BY ANOTHER IS ALONE LIABLE for the support of the child: *State v. Shoemaker*, 49 Am. Rep. 146.

DECLARATIONS OF PARENTS ARE NOT ADMISSIBLE TO BASTARDIZE ISSUE, if the marriage be proved or admitted: *Crawford v. Blackburn*, 77 Am. Dec. 323; *Dennison v. Page*, 72 Id. 644; compare *Haddock v. Boston etc. R. R. Co.*, 81 Id. 656.

FRAUD OF WIFE IN NOT DISCLOSING PREGNANCY AT TIME OF MARRIAGE was held no cause for divorce in *Long v. Long*, 24 Am. Rep. 449; but see the note thereto, pages 453-455, citing other cases showing various rulings upon this point.

BARNETT v. VINCENT.

[69 TEXAS, 685.]

EXECUTION SALE—PURCHASE SUBJECT TO EQUITIES.—Where the owner of a judgment, under which land is sold at execution sale, becomes the purchaser at such sale, and credits the purchase-money of the land upon his execution, he takes the land charged with all the equities to which it is subject, and acquires no title under the execution sale as against a claimant in possession, who had paid purchase-money and made valuable improvements, under a parol contract; and this is so although the judgment debtor was the apparent owner of the land when the debt was contracted, and when the judgment was rendered.

EVIDENCE.—TESTIMONY IMPROPERLY ADMITTED IN PROOF OF FACT IS HARMLESS ERROR, if the same fact was proved by other evidence which was competent and uncontradicted.

ACTION of trespass to try title. The opinion states the case.

J. Earl Preston, for the appellant.

W. W. Meacham, for the appellees.

WILLIE, C. J. The appellant brought suit against Robert Vincent upon a promissory note, executed by the latter February 18, 1884, and had an attachment levied on fifty acres of land, and at the sale of the land under the judgment obtained in the suit bought it, crediting the purchase-money upon the execution. Appellant then instituted this action of trespass

to try title, for a recovery of the land, against the appellees, who were in possession. The appellee's claim to the land is substantially as follows:—

In January, 1871, Robert Vincent and Sawney Williams bought of Robert Lockhart five hundred acres of land, paying in cash one thousand dollars, and giving notes for the balance of the purchase-money, about four thousand dollars. Robert Vincent and Sawney Williams were brothers-in-law, and the former had two and the latter three children. Gif Williams, son of Sawney, married Maria, a daughter of Robert, in 1871. Lockhart retained a vendor's lien for the unpaid purchase-money, and one Barker loaned the purchasers one thousand dollars they paid in cash. The land, when bought, was unimproved; but the purchasers placed tenants upon it to clear it up, and soon thereafter moved upon it themselves, and have ever since resided upon the land. It was the understanding between Williams and Vincent and their children, made known at the time, that they were to live together upon the land and use their joint earnings to pay for it. Also, that when paid for, each child should have fifty acres of land set apart to him by metes and bounds. When they went on the land, each party selected a place to settle and build upon it, the defendant Gif Williams building in 1871 on the land selected for his wife, but he afterwards moved upon another tract selected for himself. The Lockhart debt was paid in 1876, and the Barker debt in 1883, all contributing their individual means toward its payment.

On January 14, 1879, Sawney Williams made a deed to Gif Williams of one hundred and fifty acres of the land, reserving the right of possession during life; and on August 18, 1882, Robert Vincent made a deed to Maria Williams for fifty acres of the land, for a home, to revert to the grantee on breach of certain conditions. This latter deed was filed for record October 14, 1882. Sawney Williams and Robert Vincent having previously divided the five hundred acres between themselves, on December 18, 1883, the former deeded to Gif Williams fifty acres, and the latter to his daughter, Maria Williams, fifty acres, and to his son fifty acres also, and each a like quantity to his other children, the deeds describing the land according to a previous survey made by one Berkley, and each party's survey including the land and improvements occupied by him. These deeds were recorded December 20, 1883. Harvey Vincent and Gif Williams lived on the land set apart and

afterward deeded to them with their families continually from 1871 to the beginning of this suit, clearing and opening their farms at a heavy expense.

The note upon which the attachment was sued out, under which appellant claims, was given for the balance due on open account for supplies furnished by Barnett to the elder Williams and Vincent, for themselves and their sons and daughters and their families during the course of several years, ending in 1882 or 1883. The purchases were made with the understanding that such supplies should be charged to the elder Williams and Vincent. Upon this state of facts the cause was submitted below to the judge, who placed his conclusions of law and fact in the record, and rendered judgment for the appellees. Barnett appealed.

The appellant having credited the purchase-money of the land upon his execution took the land charged with all the equities of the appellees, and subject to the same: *McKamey v. Thorp*, 61 Tex. 648. The equities of the appellees were these: The land had been bought in the name of their parents, for the benefit of the appellees as well as of the nominal purchasers. It was paid for as well with the means of the appellees as of their parents and the other parties interested. This made the parties in whose names the land was bought trustees for the benefit of the appellees to the extent of the land intended for them, and for which they paid. This trust was not within the statute of frauds, and it was not necessary, therefore, that it should be in writing: *James v. Fulcrod*, 5 Tex. 512; 55 Am. Dec. 743.

The interest intended for each of the appellees was set apart to him, and he settled thereon and improved it, and continued to reside on and cultivate this portion of land for more than ten years before the commencement of this suit. Under this state of facts the appellees were entitled to demand of their parents specific performance of the contract under which they purchased the lands; and were also entitled to hold it against them under the statute of limitation of ten years. As against the parties in whose names the land was bought, the appellees had a good title, and of this their possession put all others on notice.

As a mere purchaser at execution sale of the land or the property of Robert Vincent and Sawney Williams, appellant acquired no better title than was held by the defendants in execution, which, as we have seen, amounted to nothing. But

he claims that the land was conveyed to the appellees by the defendants in execution in 1883, after the debt which formed the basis of the attachment suit had accrued, and that the conveyance was in fraud of his rights as a creditor. But the conveyances of 1883 were made in pursuance of the previous contract of the parties. It was a conveyance of the legal title to those who already held the equitable, and could compel the conveyance they received. It was a conveyance to those who were already entitled to hold the land against the grantees, whose title, so far from having its beginning in the deed, was good without it, — the only object of the deed being to furnish the best evidence of its existence. A vendor cannot commit a fraud in making a deed to a grantee to whom the land already belongs. He parts with nothing subject to the payment of his debts.

It is not very clear as to the time at which the balance of account for which the note was given accrued, but it did not antedate the title of appellees; for that commenced with the contract of purchase, or at least with their first possession of the lands upon which they settled.

The conveyance from Robert Vincent and Sawney Williams to the appellees was not a voluntary conveyance; and even had there been fraud on the part of the grantors, it could not have affected the grantees' title, as they did not participate in the fraud. They were receiving the evidence of their own title, and not acquiring property of another.

Nor do we think that the appellees allowed the elder Vincent to obtain credit on faith of owning the land in controversy. They had no reason to suppose that the credit was extended, wholly or in part, on account of the land. They were in possession of it, notoriously claiming it, and it was the duty of the appellant to make inquiry as to their title before giving credit to the persons in whom the legal title was vested. They were authorized to conclude that he had made the inquiry, and had satisfied himself as to the state of the title. The appellant had had an account with their fathers for years, and had received large payments from them, and the appellees were authorized to believe that for this reason they still obtained credit for their purchases. We think the court could but come to the conclusion that the appellant acquired no title to the land under the execution sale.

The brief of appellants raises some questions of evidence; but it is sufficient to dispose of the two first to say that, if

the testimony was improperly admitted, the appellant was not prejudiced, as the same facts were proved by other witnesses and were uncontradicted, and the cause was tried by the court without a jury.

The account of the dealings between the appellant and Robert Vincent and Sawney Williams was admissible, because it tended to show that credit to a large amount had been extended by the former to the latter during a long series of years, and large payments had been made upon the account, thus rebutting in some degree any presumption of fraud on the part of the debtors. It also tended to fix the date when the items for which the note was given accrued, and thus show whether the title of the appellees was prior or subsequent to them in date. If admissible for these purposes, the action of the court was harmless error, as the account in no wise prejudiced the plaintiff's case. There is no error in the judgment, and it is affirmed.

EXECUTION SALES, WHEN RULE OF CAVEAT EMPTOR APPLICABLE TO: *Walbridge v. Day*, 83 Am. Dec. 227; *Magwire v. Marks*, 75 Id. 121; *Boggs v. Fowler*, 76 Id. 561; *Burns v. Hamilton*, 70 Id. 570, and note 572.

JUDGMENT CREDITOR WHO PURCHASES UNDER HIS JUDGMENT stands in his debtor's place, and takes the property subject to every liability under which the debtor held it: *Walton v. Hargroves*, 97 Am. Dec. 429; but this rule is subject, in equity, to the qualification that he takes the title subject to the equities then existing against the judgment debtor, or which have since arisen through want of knowledge of the judgment: *Filley v. Duncan*, 93 Am. Dec. 337; and see *Churchill v. Morse*, 92 Id. 422; *Wallace v. Bartle*, 89 Id. 584.

JUDGMENT WILL NOT BE REVERSED FOR IMPROPER ADMISSION OF TESTIMONY, if the facts sought to be proven by such testimony have been clearly established by other competent evidence: *Spencer v. Milwaukee etc. R. R. Co.*, 84 Am. Dec. 758.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

ATLEE v. BARTHOLOMEW.

[69 WISCONSIN, 43.]

CONTRACT MUST BE BINDING ON BOTH PARTIES TO SUSTAIN an action at law by either to recover for a breach thereof.

RATIFICATION OF CONTRACT ENTERED INTO BY PERSON ACTING AS AGENT, BUT WITHOUT AUTHORITY SO TO DO, made by the person for whom he assumed to act as principal, cannot validate the contract so as to bind the other contracting party without his assent.

CONTRACT FOR THE SALE OF LAND MUST BIND BOTH PARTIES or it can bind neither.

ACCEPTANCE OF AN OFFER, AFTER THE TIME LIMITED IN SUCH OFFER, cannot bind the person making the offer, unless he assents to the acceptance after knowledge that it was not made within the time limited.

ORAL EXTENSION OF TIME WITHIN WHICH AN OFFER TO SELL REAL ESTATE MIGHT BE ACCEPTED cannot be shown, because the whole of the contract for the sale of real estate must be in writing.

Ring and Youmans, and Pinney and Sanborn, for the appellants.

McBride and Grow, and R. J. McBride, for the respondents.

TAYLOR, J. This action is brought to recover damages for an alleged breach of contract to convey lands to the plaintiffs, which they allege that they had purchased of the defendants. On the trial the court ordered the plaintiffs to be nonsuited, and from the judgment in favor of the defendants the plaintiffs appealed to this court. The only question in the case is, whether the evidence introduced by the plaintiffs showed a valid contract with the defendants for the purchase of the lands described in the complaint. It is admitted that there

was no formal contract in writing between the parties, but, on the part of the appellants, it is insisted that the correspondence between the parties shows an existing and binding contract for the purchase and sale of the lands in question. For the purposes of this appeal it may be admitted that the evidence shows that the defendants were, previous to January 30, 1884, and down to October 8, 1885, the owners of the lands in controversy, and that all of the said lands were situate in township 23 north, of range 1 east.

The evidence relied upon by the plaintiffs to prove the contract is, first, a letter purporting to be written and signed by the defendants, bearing date at Vannessa, Ontario, January 30, 1884. The following is a copy of the letter after the date:—

“S. & J. C. ATLEE, Fort Madison, Iowa.

“Gents,—Yours of the 26th to hand, asking us to name price on our lands in 23, 1 E. We do not care to dispose of it in small lots. We herewith inclose you a list of our lands in 23, 1 E. Will sell all or none, as we have had quite a number of applicants. We are open to sell if price suits. Will you make us an offer for the whole? If so, please state price, and terms easy.

Yours respectfully,

“J. A. & H. BARTHOLOMEW.”

The list of lands referred to in this letter was produced on the trial by the plaintiffs. No further written communications were had between the parties until October 8, 1885, when the following telegram was written and sent:—

“LA CROSSE, October 8, 1885.

“J. A. BARTHOLOMEW: What is your lowest cash price for all the pine land?

[Signed]

“R. FAHEY, Agt. for S. & J. Atlee.”

The evidence shows that this telegram was received by the defendants at Neillsville, in this state, on the same day, and was immediately answered by a telegram written by J. A. Bartholomew as follows:—

“NEILLVILLE, WIS., October 8, 1885.

R. FAHEY: Twenty-three thousand five hundred dollars. Must know by 2:30 to-day.

[Signed]

“J. A. BARTHOLOMEW.”

The above are all the written communications between the parties.

The proof shows that Fahey received the telegram of J. A.

Bartholomew at La Crosse about 2 o'clock, P. M. After the receipt of this telegram by Fahey at La Crosse, he communicated with the defendants by telephone, and asked further time; and there is evidence tending to show that the defendants extended the time by telephone to 4 o'clock, P. M., same day. And at 3:45, P. M., same day, Fahey telephoned from La Crosse to the defendants at Neillsville as follows: "The Atlees accept your proposition, and will take the pine land at the price offered, twenty-three thousand five hundred dollars."

The learned circuit judge, in deciding the case, says "that the testimony, taken together, does not make a contract, and that, if everything else was proved, the plaintiffs have failed because their alleged acceptance was not in writing, but by parol, and that the contract, and the whole contract, must be in writing."

After a careful reading of the evidence in the case, we are satisfied that the learned circuit judge was right in holding that the evidence was not sufficient to sustain the plaintiff's action. In the first place, we think there are grave doubts whether the correspondence, which it is alleged constitutes the contract between the parties, sufficiently describes the lands purchased. It is true, the evidence shows that in January, 1884, the defendants sent the plaintiffs a list of lands owned by them in a certain township in this state, and there is a strong presumption that the further correspondence relates to the lands described in such list. But this list was sent more than eighteen months before the inquiry was made by the plaintiffs in regard to the price at which the defendants would sell their lands. And the inquiry then was as to the price of all the pine land. The list furnished eighteen months before does not describe the lands as pine lands; and it must be shown, therefore, by parol evidence, either that the words in the inquiry referred to the list furnished before, or the words "all the pine lands" might mean all such lands then owned by the defendants in the state, county, or township mentioned in said list. Had the parol evidence clearly established the fact that only a small part of the several tracts described in the list sent by defendants to plaintiffs were pine lands, could the plaintiffs have compelled the defendants to convey all of said tracts were it admitted that the contract was sufficient in the law to bind the parties? We think it doubtful whether a purchase of all the pine lands owned by the defendants, without other description, would cover any

lands which are not in fact pine lands, and that it would be incompetent to show, by parol, that the contract was intended to cover all the lands owned by the defendants.

We are not, however, disposed to place our decision in this case upon the want of a sufficient description of the property, about which there were negotiations. We think the plaintiffs entirely fail to show that Fahey, who accepted the offer made by the defendants, had any authority to accept such offer on their behalf when he so accepted it. It will be noticed that neither of the plaintiffs appeared as witnesses in their own behalf to prove the authority of Fahey, and the evidence of Fahey himself is of too vague and unsatisfactory a nature to justify a court or jury in holding that he had authority to bind his principals by a purchase of this magnitude. It is also to be noticed that the only written communication between the plaintiffs and Fahey about this purchase very clearly indicates that they had given him no power to bind them by any definite agreement, without first consulting with them about its terms. The written communication referred to was contained in a letter written by the plaintiffs to Fahey, probably on the 8th of October, 1885, and was not received by him until after he claims to have bound them by his contract with the defendants. In this letter they say: "When you were here, nothing was said about terms or time, and we wired you to take the timber if terms and time could be made satisfactory. If we buy, the title must be looked after, as a tax title will hold the stumpage. If we buy, we want to know all about the land. In case of trade I will come up. Will look for a telegram from you to-morrow." The evidence shows that this letter was written in regard to the proposed purchase of the lands in question. This certainly does not look like giving Fahey authority to purchase the lands for cash down, and without any investigation as to defendants' title.

Had the purchase claimed to have been made by Fahey turned out to be a bad one for the plaintiffs, we think the defendants would have failed in holding the plaintiffs to the contract made by Fahey. The rule is well established that, in order to hold the defendants to their contract, the plaintiffs must also be bound by the same contract: *Dodge v. Hopkins*, 14 Wis. 630, 637-641; *Townsend v. Cornīng*, 23 Wend. 435, 444. It must be remembered that this is an action at law to recover damages for the alleged breach of contract, and it is clear that in all such cases the contract must bind both par-

ties. Under the evidence in this case, it seems clear to us that the plaintiffs have not bound themselves to the defendants to pay them twenty-three thousand five hundred dollars, or any other sum, as the consideration for the defendants' promise, if they have made one, to convey certain described lands to the plaintiffs. Fahey, claiming to be the agent of the plaintiffs, has promised on their behalf to pay it; but if he had no authority at the time he made the promise to bind the plaintiffs as their agent, they are not bound, and so the defendants are not bound. Their promise is void for want of mutuality or consideration to sustain it. If the plaintiffs were not bound by the promise of Fahey when he made it, then the contract is void as to the plaintiffs, and the subsequent acts of the plaintiffs affirming the authority of their agent cannot validate the contract so as to bind the defendants without their assent. This seems to have been the doctrine clearly stated by the decision of this court in *Dodge v. Hopkins, supra*, and of the supreme court of New York in *Townsend v. Corning, supra*. In *Lowber v. Connit*, 36 Wis. 183, this court again say, speaking of a vendee in a contract for the purchase of land who has not signed the written contract: "He ought not to be in a position where he can hold the other party to the contract, and compel its performance if advantageous to him, and at the same time be at liberty to avoid the contract on his part if disadvantageous. Both parties ought to be bound by the contract, or neither should be bound." This seems to be a most just rule; and where the plaintiffs were not bound by the contract when it was entered into by one claiming to be their agent, but who in fact was not such agent, and had no power to bind them, they cannot afterwards, when they find the contract is advantageous to them, affirm the contract made on their behalf by such unauthorized person, and compel the other party to perform it on his part.

We are also of the opinion that there is another fatal objection to the recovery of the plaintiffs in this action. The evidence clearly shows that there never was any written agreement made by the defendants to convey the lands to the plaintiffs, which was accepted by them or by their supposed agent. If the telegrams set out in the case, aided by the other evidence in the case, sufficiently describe the lands to which they relate so as to satisfy the statute, then we have this case: The defendants made an offer in writing to sell the lands to the plaintiffs for a specified sum of money, and limited the

time within which such offer must be accepted by the plaintiffs to a certain fixed time in the future. The evidence is conclusive that the offer was not accepted within the time fixed. If there were nothing more in the case, it is clear that an acceptance of the offer after the time limited for that purpose would not make a contract; and if, in the mean time, the defendants had sold the lands to other parties, such parties would have attained a perfect title, although they had full knowledge of the offer made to the plaintiffs. An acceptance, after the time limited in the offer, will not bind the person making the offer, unless he assents to the acceptance so made after it is made: *McCullough v. Eagle Ins. Co.*, 1 Pick. 278; *Larmon v. Jordan*, 56 Ill. 204; *Boston etc. R. R. Co. v. Bartlett*, 3 Cush. 224; *Adams v. Lindsell*, 1 Barn. & Ald. 683; *Eliason v. Henshaw*, 4 Wheat. 225. But it is insisted that there was evidence that the time for the acceptance was extended by parol after the written offer was made, and that the acceptance was within the time so extended. The evidence of such extension of time to accept the offer is not very satisfactory; but if the plaintiffs' rights depended upon that as a question of fact, they were probably entitled to have that question passed upon as a question of fact by the jury. In determining this case, we must, therefore, treat the case as though the fact of the extension of the time for accepting the offer was extended by parol.

Where the law requires a contract to be in writing in order to bind the parties, and the writing signed and produced in evidence shows that the contract signed by the party who is to be bound by it is to be completed by an acceptance of the other party within a limited time, it is incompetent to show by parol evidence that the time for its completion, by such acceptance, was extended to some other date not mentioned in the contract signed by the party to be bound. The acceptance of the party after the time fixed in the written contract, which is to bind the party signing it, does not show that the contract in writing was the contract between the parties, but an entirely different contract, and so the contract actually made by an acceptance, after the time fixed in the writing, is a contract not in writing, and so void under the statute. This is not a case of extending the time for the performance of a valid contract already entered into by the parties, either by a new agreement by parol or in writing, but the question is, whether the proof shows that the plaintiffs accepted the prop-

osition of the defendants in writing, by which they seek to bind the defendants. And the evidence clearly shows that the proposition was not accepted as made, and so there is no written contract proved which can bind them.

Admitting that the proofs show a written promise signed by the defendants to sell the lands to the plaintiffs on condition that the plaintiffs accepted it within a limited time, and the plaintiffs now seek to hold the defendants liable upon a written promise to sell, if accepted, at another time than that stated in the writing, the contract sought to be established by the plaintiffs is clearly not in writing, and is therefore void under the statute. Had the plaintiffs accepted the offer as made within the time limited, and it was held that the lands were sufficiently described, and that the person occupying them was authorized to do so, and they had then sought to establish by parol that the time for performing on their part had been extended by a parol agreement, a different question would be presented. Even in that case, we think the weight of the authorities holds that when the original contract must be in writing in order to bind the parties, no extension of the time of performance by parol would be admissible to vary the original contract: *Abell v. Munson*, 18 Mich. 306; *Cook v. Bell*, 18 Id. 387; and other cases cited in respondents' brief. But as that question is not in this case, we do not deem it necessary to consider it.

We think the learned judge was right in holding that the evidence did not show any valid contract for the sale of said lands to the plaintiffs, although he was probably wrong in holding that it was necessary that the acceptance of defendants' offer should be in writing in order to bind them.

By the COURT. The judgment of the circuit court is affirmed.

THE EFFECT OF THE RATIFICATION OF A CONTRACT, which upon the one side was entered into by an agent undertaking to act for his principal, but not authorized so to do, may be considered, — 1. With respect to such principal; 2. With respect to the other party to the contract; and 3. With regard to its effect upon persons who are not parties to the contract or act sought to be ratified. The statement is frequently made that a subsequent ratification is equivalent to a prior authorization; or in other words, that a ratification operates retroactively, or by relation, back to the date of the doing by the agent of the act ratified. This is unquestionably true, as against the principal who ratifies. By such ratification, he waives, so far as he can, the want of authority in the person who assumed to act as his agent, and he irrevocably binds himself by the contract ratified and to every part

thereof; or, if the matter rests in tort, the principal, if the tort is susceptible of ratification, becomes answerable in damages to any party injured thereby: *Despatch Line v. Bellamy Mfg. Co.*, 37 Am. Dec. 203; *Clealand v. Walker*, 46 Id. 238; *McMahan v. McMahan*, 53 Id. 481; *Kountz v. Price*, 40 Miss. 341; *Lawrence v. Taylor*, 5 Hill, 107; *Pollock v. Cohen*, 32 Ohio St. 514; *Ohio & M. Co. v. Middleton*, 20 Ill. 629; *Bell v. Byerson*, 11 Iowa, 233; Story on Agency, secs. 239, 242. From the moment of ratification, it becomes the principal's contract, as between him and the agent. He is entitled to its benefits as well as subject to its burdens. The agent is responsible to the principal for any moneys or property received under it, and cannot defend against the principal on the ground that he (the agent) received the money or property without authority: *Strickland v. Hudson*, 55 Miss. 235.

When an act is done or a contract entered into in the name of a principal, without his authority, he is confessedly in no way affected by it, unless he should choose to ratify it. If it is binding on the other party, in advance of such ratification, then he is obligated by a contract, which his adversary may treat as void or valid at his pleasure. At most, a contract so executed seems, on principle, to amount to no more than a proposal on the part of him who executed it, which he should have the right to recede from until it has been ratified or accepted, so as to become binding on the other party. This is the view sustained by the principal case and prior Wisconsin cases, and also supported by *Townsend v. Corning*, 23 Wend. 435, cited in the principal case. We think this principle may fairly be said to be supported by the principles which controlled the decision of the court in *Wardell v. Williams*, 4 Am. St. Rep. 814, and *Wilkinson v. Heavenworth*, 58 Mich. 574, 58 Am. Rep. 708.

The weight of authority bears, however, in an opposite direction, and in harmony with decisions which enforce contracts wanting the element of mutuality at the date on which they were entered into. A principal may, therefore, generally ratify a contract, whether the other party is willing he should do so or not, and may, after such ratification, enforce the contract against the other party. To this rule there are many exceptions, and some effort has been made to formulate tests or principles by which to determine whether a given case falls within the rule or within the exceptions. These tests are thus stated and illustrated in sections 245-248 of Story on Agency: "Where an act is beneficial to the principal, and does not create an immediate right to have some other act or duty performed by a third person, but amounts simply to an assertion of a right on the part of the principal, there the rule seems generally applicable. Thus, for example, if a continual claim, or an entry to avoid a fine, or an entry for condition broken, is made by a person having no present authority, the principal may bring an action on any of these acts, and his ratification or adoption of them will supply the want of an original authority. On the other hand, if the act done by such third person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damage or losses, for the non-performance of that act or duty, or would defeat a right or estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it, so as to bind such third person to the consequences. Thus if a lease contains a condition that it may be determined by either party upon six months' notice, such notice, given by an unauthorized person for the landlord, although subsequently ratified and adopted by the latter, will not be a valid notice to determine the lease. The ground of the decision is, that it is a notice to defeat an estate,

and the tenant is entitled to such notice as he can act upon with certainty at the time he receives it, so that he may deliver up the possession at the end of the six months, without being liable to further claims with respect to the remainder of the term. The case is distinguishable from that of an entry without authority, for a condition broken; because, in the latter case, the third person's act is not to depend upon the validity of the entry at the time when it is made. The rule, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, seems applicable only to cases where the conduct of the parties, on whom it is to operate, not being referable to any agreement, cannot, in the mean time, depend on the fact whether there be a ratification or not.

"Upon similar grounds, a demand upon a debtor, and refusal by him to pay a debt made by an unauthorized agent, will not take away the right of the debtor to plead a prior tender of the debt to the principal; for, as the agent had no authority to make the demand, payment to him would not have discharged the debtor from the debt. The subsequent adoption of the act by the principal would not vary the right of the debtor in such a case, since he could not safely pay to one who was without authority at the time to receive the money and to give a discharge. So a demand of goods, made by an unauthorized person, will not, though subsequently adopted by the principal, be evidence to support an action of trover for a conversion against the party in whose possession the goods were, and of whom they were demanded. So a demand, made by a person not authorized, of payment of a promissory note or bill of exchange, will not, even though afterwards ratified by the holder, constitute a good demand upon the party, so as to make him liable for damages for his default in payment. So notice of the dishonor of a promissory note or bill of exchange, by a mere stranger, not a party to the same bill, or authorized thereto, will not be a good notice to bind an indorser or drawer. So, also, where A does an act as agent for B, without any communication with C, C cannot, by afterwards adopting the act, make A his agent, and thereby incur any liability, or take any benefit under the act of A.

"Let us now return to the effect of a ratification by the principal in ordinary cases. As, from what has been already said, the principal thus acquires a right to elect whether he will adopt the unauthorized act or not, it must be admitted that the parties do not generally stand upon equal terms; since the principal may always elect to ratify the act if it is for his benefit, and to disavow it if it is to his injury. But this consequence has never been allowed to overcome the force of the general doctrine. Thus, for example, where an unauthorized agent procured an insurance to be made upon a certain ship for the benefit of the owner thereof, and the ship was lost during the voyage, and long after the loss the owner ratified the insurance, and a suit was brought against the underwriters, it was held to be no objection to the recovery that the ratification was not until long after the loss, and that the owner would not have been bound to pay the premium if the ship had safely arrived; for the agent had still a right to effect the insurance, and to take the chance of its being adopted; and he could not have recovered back the premium paid by him to the underwriters, upon the ground that he had no authority, and that therefore there was no interest insured; because the underwriters would have borne the risk until there had been a disavowal by the principal."

Mr. Wharton, at sections 76 and 77 of his work on agency, also affirms the right of the principal to ratify contracts entered into in his name, but without his precedent authorization. He says: "In other words, to adopt the exposition of an eminent German commentator, when an agent undertakes

an act for another person, the legal character of the act remains undetermined until such other person decides whether or no he will ratify. The contract is not void, but occupies the same position as one that is conditional. The third contracting party is bound from the time of the instituting of the contract, and not merely from that of its ratification. The agent cannot, even in this intermediate period, release the third party from liability. *A fortiori* such release is not worked by the intervening death or other incompetency of the agent. . . . The principal, by the act of ratification, puts himself in his agent's place. From this it follows that the ratification acts retrospectively; and nowhere is this more unhesitatingly expressed than in the Roman law. The principal, so that law assumes, puts himself, by the ratification, back into the period in which the contract was executed. But accepting this principle as unquestioned, we must limit its application to the relations of the principal to the contracting third party. The third party is precluded from contesting the right of the principal to go back to the inception of the original contract."

If the party on whose behalf the contract was authorized has received some benefit therefrom, there seems to be no hardship in permitting the other party to ratify the contract, and thereby make it operative by relation as of the date at which the contract was first entered into, or at least, as of the date when the benefit acquired by it was first received. Hence, where the premium for an insurance was paid to and retained by an insurance company by a person acting as agent of a property owner without authority, there was no impropriety in permitting such owner to ratify the act of the unauthorized agent when it became known to him, though after a loss had occurred from the peril against which the insurance was effected: *Hagedorn v. Oliverson*, 2 Maule & S. 485. So when property has been sold, or money loaned by an agent acting without authority, or so far departing from the terms of his authority that his principal is not bound by his act, and the purchaser has received the property, or the borrower the money, the principal may undoubtedly ratify the unauthorized act: *Foster v. Bates*, 12 Mees. & W. 226; *State v. Torinus*, 37 Am. Rep. 395; *State v. Shaw*, 28 Iowa, 67; and thereupon may recover on obligations or securities given to pay for such property or to secure their payment of such loan.

In *Maclean v. Dunn*, 4 Bing. 722, a contract of purchase, which, to satisfy the statute of frauds, must have been in writing, was signed on behalf of one of the parties by an unauthorized agent. The signing was subsequently ratified by the principal, orally, and this was held to satisfy the statute, and to make the contract obligatory on both parties. In *Mason v. Caldwell*, 48 Am. Dec. 330, it appeared that a contract for the sale of real property had been made by a guardian, acting without competent authority; that the ward very soon afterwards became of age, ratified the contract, and tendered the purchaser a conveyance in pursuance thereof, which the latter declined to receive. An action having been brought against the purchaser, he was held to be liable on the contract. The court did not, however, rest the liability on the power of a principal to ratify and enforce a contract which, but for such ratification, would be entirely void and inoperative as against all persons. It contended that the contract as entered into was binding on the guardian, if the principal had declined to be bound by it, because an agent is bound to make good his contract personally when he contracts without authority; that the contract was therefore not void nor wanting in mutuality; and hence that the purchaser could not escape from it. Upon the same principle, it has been determined that if a party contracting for the purchase of real estate takes a

contract signed on behalf of the vendor by an unauthorized agent, who guarantees that the contract will be approved by the principal, this guaranty furnishes a sufficient consideration for the contract on the part of the purchaser, and he cannot successfully deny the right of the vendor to ratify and enforce it: *Weiseger v. Wheeler*, 14 Wis. 101.

Upon the whole, we think the authorities, though not with the unanimity which some text-writers have supposed to exist, sustain the rule laid down in *Andrews v. Aetna Life Ins. Co.*, 92 N. Y. 604, as follows: "The principal, upon being informed of an act of his agent in excess of his authority, has the right to elect whether he will adopt the unauthorized act or not, and so long as the condition of the parties is unchanged he cannot be prevented from such adoption, because the other party to the contract may for any reason prefer to treat the contract as invalid, and his election once made is irrevocable."

It is true that Mr. Mechem, in section 179 of his work upon agency, declares the rule to be precisely the reverse of this, for he says: "If an agent, without authority, enter into a contract with another, by which, on account of such lack of authority the alleged principal is not bound, the principal cannot, when he afterwards finds the contract is advantageous to him, affirm the contract so as to compel the other party to perform it on his part." In support of this rule the author cites the principal case and the cases therein cited; and they unquestionably sustain him. But he surely must have stated his conclusion with more diffidence had he taken into consideration the cases of *Maclean v. Dunn*, 4 Bing. 722; 1 Moore & P. 761; *Soames v. Spencer*, 1 Dowl. & R. 32; *Hammond v. Hannin*, 21 Mich. 374; *Andrews v. Aetna Life Ins. Co.*, 92 N. Y. 596; and the opinions of writers so eminent as Mr. Wharton and Judge Story.

As we have hereinbefore suggested, a contract signed by one of the parties in person or by his duly authorized agent, and for the other party by an agent acting without authority, seems upon principle to amount to no more than a proposal by the former party which the latter may accept or not. A proposal, from its absence of binding obligation on the party to whom it is made, is apparently wanting in all the elements of mutuality. The weight of authority, however, does not require that mutuality in a contract shall exist during all its stages. Hence optional contracts are almost uniformly enforced after the one who had the privilege of accepting them has exercised his privilege in such a mode as to bind himself by the contract. From that moment it becomes mutual: *Shroeder v. Gemeinder*, 10 Nev. 355; *Hall v. Center*, 40 Cal. 63; *Cherry v. Smith*, 39 Am. Dec. 150, and note; Pomeroy on Contracts, sec. 169; *Ewins v. Gordon*, 49 N. H. 444; *Smith v. Fleckl's Appeal*, 69 Pa. St. 474; *Vassault v. Edwards*, 43 Cal. 458; and will be enforced if it is such a contract that the parties may have a reciprocal remedy upon it. If, however, the contract as accepted is such that the court is incompetent to compel one of the parties to specifically perform his part of it, then he will be unable to obtain the aid of the court to compel its performance by the other party: *Cooper v. Pena*, 21 Cal. 411. Applying these principles to a contract which is not binding on one party because his signature is affixed or his assent otherwise expressed by one acting without his authority, it would seem that he might, within a reasonable time after receiving notice of its existence, elect to ratify or confirm it, and upon expressing his ratification in such form as to preclude his subsequent withdrawal from it, and as to entitle the adverse party to compel him to perform it, then that he, on his part,

might enforce it to the same extent as if it had originally been entered into by his authority

Third persons have the right to treat an unauthorized act or contract, while it remains unratified, as having no existence whatever. If it purports to affect the title to property, they may nevertheless deal with such property, if it be the property of the party who did not authorize the contract or act, and may acquire the title thereto or secure liens thereon, whether by the voluntary act of such party, or by legal proceedings prosecuted against him, and he cannot by any subsequent ratification of the unauthorized act give it any retroactive effect as against them, nor impair their title or lien in any respect: *Parmlee v. Simpson*, 5 Wall. 84. Hence if an unauthorized assignment of a debt is made, and thereafter it is garnished under a writ against the assignor, he cannot, by a subsequent ratification of such assignment, defeat the garnishment: *Wood v. McCain*, 42 Am. Dec. 612. The same principle applies with like results, when an unauthorized sale is made of goods, followed by their attachment as the property of the vendor, which he seeks to supplant by ratifying the unauthorized sale: *Pollock v. Cohen*, 32 Ohio St. 514; *Taylor v. Robinson*, 14 Cal. 396. So, as a general rule, if a party has a complete cause of action or defense when a suit is commenced, he cannot be deprived thereof, *pendente lite*, by his adversary, or some other party, ratifying some act or contract which at the commencement of the action was without any binding force for want of such ratification: *Fiske v. Holmes*, 41 Me. 441; *Wittenbrock v. Bellmer*, 57 Cal. 12; *contra: Ancona v. Marks*, 7 Hurl. & N. 686; *Persons v. McKibben*, 61 Am. Dec. 85.

PHILLIPS v. TOWN OF WILLOW.

[70 WISCONSIN, 6.]

HIGHWAYS—EVIDENCE OF SIMILAR ACCIDENTS.—In action for injuries sustained by plaintiff from defect in public highway, evidence is inadmissible that at about the same time other accidents, similar to that which resulted in injury to the plaintiff, had happened to other persons from the same defect.

Miner and Berryman, and Pinney and Sanborn, for the appellants.

Black and Burnham, for the respondents.

COLE, C. J. This is an action to recover damages for injuries sustained by the female plaintiff while passing along a public highway in the defendant town. She and her husband were riding in a cutter, which was overturned by the runner striking or going over a stone. It was claimed that this stone was in or very near the traveled track of the highway, and constituted a defect or dangerous obstruction thereof. On the part of the plaintiffs, witnesses were allowed to testify, against the objection of the defendant, that near the time the

accident occurred they drove along the highway,—in one case with a wagon, and struck the stone in question and came near tipping over; in the other case the witness was in a cutter, and ran against the stone and was tipped over. It is claimed by the defendant's counsel that this testimony as to what happened to others in driving against the alleged defect was inadmissible, and was calculated to prejudice the town, and for this reason a new trial should be awarded. We think this position is sound and must prevail. Upon principle, and by the better rule of law, we consider the evidence inadmissible.

The question is not entirely new in this court. In *Bloor v. Delafield*, 69 Wis. 273, a kindred question was presented and considered. That was also an action for injuries caused to the plaintiff by being thrown from his buggy, his horse being frightened by a mortar-box in the highway while he was driving past it in the evening. Testimony was offered on the part of the town that many horses were driven past the mortar-box the day it was within the limits of the highway without being frightened. This testimony was objected to and excluded. This court approved the ruling of the trial court, and held the testimony inadmissible. Mr. Justice Lyon, in the opinion, says to hold such testimony admissible would be to open the door to numerous and perplexing side issues, which is always to be avoided. Issues would be made not raised by the pleadings, and which presumably neither party would be prepared to try.

It must be admitted that the cases are not in accord upon this question. In some it is held that the evidence of other accidents, or of the effect on carriages driven by other persons than the plaintiff over the same road, is competent, because it has a tendency to show its fitness or unfitness for public travel: *Kent v. Lincoln*, 32 Vt. 591; *Quinlan v. Utica*, 11 Hun, 217; or tends to prove that the object was or was not naturally calculated to frighten horses: *Darling v. Westmoreland*, 52 N. H. 401; 13 Am. Rep. 55; *House v. Metcalf*, 27 Conn. 632; or to show knowledge on the part of the city that a bridge was not properly lighted so as to be safe to persons crossing it: *Chicago v. Powers*, 42 Ill. 169; 89 Am. Dec. 418; or to show the result of experience or experimental knowledge of the possibility of the negligent act relied on as causing the injury: *Piggot v. E. C. R. Co.*, 3 Com. B. 229; and *Morse v. M. & St. L. R'y Co.*, 30 Minn. 465.

Other courts have held, as this court did in the Bloor case, that all evidence as to collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, should be excluded, because such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them; and moreover, because the adverse party, having had no notice of such a course of examination, is not presumably prepared to meet it: 1 Greenl. Ev., sec. 52; *Collins v. Dorchester*, 6 Cush. 396; *Parker v. Portland Pub. Co.*, 69 Me. 173; 31 Am. Rep. 262; *Hudson v. Chicago etc. R. R. Co.*, 59 Iowa, 581; 44 Am. Rep. 692; *Bell v. Chicago etc. R. R. Co.*, 64 Id. 322, and the authorities referred to in these opinions.

The evidence in this case was not offered for the purpose of showing notice to the town of the defect, but to prove that the stone constituted a defect, and was in the traveled part of the highway. This was the plain object of the testimony; proving, from the experience of others who had passed with a wagon or cutter along the highway, that accidents had happened to them by driving against the stone. It is apparent that if this testimony was relevant to prove a defect, as was said in the Bloor case, it would have been competent to show that these persons were not driving carefully, or had skittish teams; also that hundreds had passed over this highway in safety with carriages, notwithstanding the alleged defect. So, issue after issue would be raised, and facts collateral to the issue made by the pleadings would multiply; the main issue forming new ones, and the suit itself expanding like the banyan tree of India, whose branches drop shoots to the ground, which take root, and form new stocks, till the tree itself covers great space by its circumference. We think it a much safer rule to confine the evidence to the issue or real fact put in controversy by the pleadings, excluding all evidence which relates to collateral matters.

The matter in issue here was, whether the highway was defective, and did such defect cause the injury to the female plaintiff while driving along the highway with proper care. The witnesses could describe the stone, its size and relation to the traveled track, and leave to the jury the question whether it amounted to a defect, or was of a dangerous character to travelers. This is not a case appropriate for giving the results of experience, nor to inquire as to who have met or who have avoided accidents at the *locus in quo*. Those are

irrelevant matters, not pertinent to the issue, and should not be gone into.

Without considering the other questions discussed by counsel, we grant a new trial for the error in admitting the evidence mentioned.

By the COURT. The judgment of the circuit court is reversed, and a new trial ordered.

EVIDENCE OF SIMILAR ACCIDENTS FROM SAME DEFECT IN HIGHWAY IS INADMISSIBLE: *Hubbard v. City of Concord*, 69 Am. Dec. 520; *Branch v. Libby*, 57 Am. Rep. 810, and note 812; *Hudson v. Chicago etc. R. R. Co.*, 44 Id. 692, and note 694. But see *contra*, *Calkins v. City of Hartford*, 87 Am. Dec. 194, and note 197; *Crocker v. McGregor*, 49 Am. Rep. 611, and note 613

FORD v. FORD.

[70 WISCONSIN, 19.]

WILL. — LAW OF PLACE WHERE LAND LIES, IN CASE OF A DEVISE, OR LAW OF TESTATOR'S DOMICILE AT TIME OF HIS DECEASE, IN CASE OF A BEQUEST, GOVERNS respectively the validity of such devise or bequest. This includes not only the form and mode of execution of the will, but also the construction and interpretation of the will and the power and authority of the testator to make disposition of his estate.

SCHEDULES REFERRED TO IN WILL AND ATTACHED THERETO should be construed with the will as one instrument, together constituting the will of the testator.

DOCTRINE OF EQUITABLE CONVERSION CANNOT BE EXTENDED TO LANDS of the testator situate in another state, when they are nowhere mentioned or referred to in the will, and it does not by implication disclose an intent to convert them.

DOCTRINE OF EQUITABLE CONVERSION BY WILL DOES NOT OPERATE AS TO LANDS which, although described in a will, are directed to be converted into other lands in the same city, and a mere discretionary authority is given to convert, unless perhaps an actual conversion should in fact occur.

DOCTRINE OF EQUITABLE CONVERSION BY WILL IS APPLICABLE TO PERSONAL ESTATE directed to be converted "as soon as practicable" after testator's death into lands in another state, or "for improving properties" therein, since the discretion as to time does not render the doctrine inoperative.

DOCTRINE OF EQUITABLE CONVERSION BY WILL IS APPLICABLE WHERE LAND is directed to be converted "at schedule prices" into property in another state, there being no negative words indicating an intent on the testator's part not to have such lands sold at a less price.

SUCH DOCTRINE IS NOT OPERATIVE WHERE LAND is directed to be converted into real estate in another state, where such conversion is dependent upon two such uncertain events as the termination of a life estate in such land, and the sale even then at a price specified in the will.

TERM "HOMESTEAD" MANIFESTLY MEANS, when used in a testator's will, the house and all the grounds in which he lived, and is not restricted to the one fourth of an acre mentioned in the statute.

CONSTRUCTION OF WILL—TRUST ESTATE—EXECUTOR.—Where there are directions in a will regarding the conversion, holding, and managing of an estate for the beneficial interest of several persons living, and to be born, as indicated, and the executor is alone named in the will, such executor takes a legal title to the whole estate in trust for the purpose mentioned. The several directions in the will are addressed to him and his successors in office, whether by ancillary administration or otherwise. He and they are to execute the will so far as the law will permit; and, subject to such segregations as the construction of the will demands, are to hold and manage the *corpus* of the estate until the residuum by the terms of the will finally passes out of their hands; nor may he or they pervert or alienate the estate in contravention of the trust.

RESIDUUM OF ESTATE.—Where a will provides that a certain definite portion of the net annual income of an estate shall be paid to certain beneficiaries, among whom was the widow, and she relinquishes her rights to her portion of such income, the share of the others is not thereby increased; and the question whether the accumulation of such undisposed of share into the residuum of the estate would or would not be valid, was not determined, since such income would arise from lands in another state.

ESTATE, WHEN SEGREGATED.—Where, from time to time, under the provisions of a will, portions of the *corpus* of the estate were to vest in fee in the son, from the moment he becomes the owner of such fee that portion becomes segregated from the estate and relieved from every provision of the will, especially from that part of it relating to the paying out to beneficiaries of the net annual income of the estate; and so much of the estate as the widow elects to take in lieu of the provision made her in the will becomes segregated in like manner.

Id.—Where a bequest is made of a specific sum of money, to take effect upon the happening of a certain contingency, — as the death of the testator's son before a certain age, leaving heirs, — if such event happens, such sum should be at once regarded as segregated from the estate, and held in trust for said heirs until such time as they can take absolutely under said will, notwithstanding the will in other parts directs the payment of all the net annual income of the estate to certain beneficiaries named therein.

CONSTRUCTION OF WILL—TRUST—VESTED INTEREST.—Where a will directed the conversion of most of the testator's lands, situate in different states, into lands in Kansas City, and also directed the conversion of the "homestead," in case the widow should not desire to reside thereon, into land in said city, the executor, as trustee, takes a future vested estate in the "homestead," and as to the other property he takes a present vested estate.

Id.—WHERE THE TESTATOR'S SON, when he reached forty years of age, was to have what was remaining of the whole estate after the payment of certain bequests, and the determination of the widow's interest therein, or in case he became the sole surviving legatee, and should die before he became vested with said estate, then the same was to be given to Hamilton College, which latter was also, upon the happening of other uncertain events, to come into the remainder of the estate, — in such case, neither

of said parties take anything more than a contingent interest therein, under the Wisconsin statutes.

PERPETUITIES — SUSPENSION OF POWER OF ALIENATION. — An attempt in a will to create a future estate in land, whereby the same is liable to be tied up from thirty to forty-eight years after the testator's death, constitutes, under the Wisconsin statute, such an unlawful suspension of the power of alienation as to make such disposition void. Such land, therefore, descends to the heirs, subject to the widow's rights therein.

ID. — THE RULE IS UNIVERSAL, THAT A SUSPENSION OF THE POWER OF ALIENATION must necessarily terminate, under any and all circumstances, within the period prescribed by the statute, or the disposition will be void.

PROPERTY IN OTHER STATES. — As to the application of the doctrine of equitable conversion to lands and property situate in other states, the courts of Wisconsin have no jurisdiction to determine the title to such lands, nor the legality of accumulations of rents and profits therefrom. It would seem that the validity of such conversion, or of the suspension of the power of alienation, would be determinable by the law of the state where the property converted is situate.

On January 26, 1886, one Francis F. Ford, deceased, leaving a will which was duly admitted to probate on May 17, 1886. The will directed the payment of the debts and funeral expenses out of the moneys on hand, or, if necessary, out of the estate. It also directed that the expenses of carrying on the estate should from year to year be paid out of the income thereof. All the other provisions of the will are expressly stated in the opinion, with the exception of subdivisions 3, 8, 9, and 12, which were as follows: "3. It is my will and I so direct that all indebtedness of any of my brothers to me shall be and hereby is canceled, and the legal evidence of such indebtedness shall be returned to the makers thereof." "8. It is my will and I so direct that, in addition to said homestead and furniture, my said wife, Maggie, shall have one quarter of the net annual income of the remainder of my estate during her natural life, subject to modifications in article 12 of this instrument; and it is expressly stipulated that the above bequests to my said wife are in lieu of dower." "9. It is my will and I so direct that my son, Marcus C. Ford, shall have one quarter of the net annual income of my estate, homestead not included, until such time as, in accordance with the provisions of this will hereinafter made, he shall come into the possession of the entire estate, but the expenditure and use of said income during his minority shall be under the control and direction of his guardian, and I appoint his mother his guardian during his minority, and in the event of her death I appoint my brothers, Edward I. and Henry T., in

her place." "12. It is my will and I so direct that when my son, Marcus C., reaches his majority, he shall become the owner in fee of ten thousand dollars' worth of my real estate, and 'at twenty-five (25) years of age he shall have an additional twenty thousand (\$20,000) dollars' worth, and at thirty (30) years of age he shall have an additional twenty-five thousand (\$25,000) dollars' worth, and at thirty-five (35) years of age he shall have an additional forty-five thousand (\$45,000) dollars' worth, and at forty (40) years of age the remainder of my estate shall become his; I also direct that the income of my said wife, Maggie, shall be kept up to fifteen hundred (\$1,500) dollars, any deficit to be taken from the income of my son, Marcus C., and as an offset thereto my son, Marcus C., shall be entitled to any excess in said wife's income over and above twenty-five hundred (\$2,500) dollars a year." The testator's brothers, Joseph C. and Henry T. Ford, were named as executors in the will, which bore date January 25, 1884. Joseph C. duly qualified and acted as executor. Two schedules were referred to in the will, and were designated therein as A and B respectively. The lands described in the first consisted of a homestead in Madison, Wisconsin, and lands in Michigan and Kansas, and were priced by the testator in said schedule at seventy-five thousand five hundred dollars, in the aggregate. The lands described in the second schedule were located in Kansas City, and were priced by the testator in said schedule at nineteen thousand two hundred dollars. The testator died in Kansas City, Missouri, but resided and had his domicile in Madison, Dane County, Wisconsin. He left surviving him a widow, one son, aged twelve, and three brothers, all of which persons were living at the time of the pendency of this action. The estate of the testator was valued at about one hundred and seventy-five thousand dollars, and was located for the greater part in Kansas and Missouri, although there was a homestead in Wisconsin valued at about twelve thousand dollars; some two hundred acres of land, or an interest therein, in Iowa, and some real estate in Michigan; there was also certain personal estate in Madison, Wisconsin, consisting of household goods, wagons, etc., together with certain rentals due from real estate. In addition there was about thirty thousand dollars in notes and mortgages, which had been assigned, or attempted to be assigned, by the testator during his lifetime to his brother, Henry T. These securities were in Kansas City at the time

of the death of the testator, where a suit was pending to determine the title thereto. The lands in Michigan, Kansas, and Missouri were worth the prices fixed by the testator in the schedules. The widow elected to take under the statutes of the several states named, in lieu of the provisions made her by the will. An action was brought by the executor in the circuit court of Dane County for the construction of the will. The complaint was answered by the widow, by the guardian *ad litem* of the testator's son, and by Hamilton College. The court found the will valid; that there was no unlawful suspension of the power of alienation, and that no part of it was within the law of this state against perpetuities to which construction of said will exceptions were severally filed by said plaintiff, the widow, the guardian *ad litem*, and Hamilton College, and appeals were taken by them from the judgment entered thereon to this court.

I. C. Sloan and John M. Olin, for the executor.

Pinney and Sanborn, for Marcus C. Ford.

Stevens and Morris, for Margaret G. Ford.

Gregory, Bird, and Gregory, for Hamilton College.

CASSODAY, J. At the time of the testator's death, and for several years immediately prior thereto, his residence and domicile were in the city of Madison, Wisconsin. As stated, he left personal property and large amounts of valuable lands in Wisconsin, Michigan, Iowa, Kansas, and Missouri. His widow and little boy, Marcus C., and his three brothers and Hamilton College, are the sole objects of his bounty. The will is unique. It is said to have been drawn by the testator himself. It may be doubtful whether it would have presented more intricate questions for solution had it been drawn by a skillful lawyer with that end in view. Its validity is challenged as a whole and in parts, and a construction is demanded. The language employed seems to be sufficiently clear to indicate the purposes intended. The difficulties arise in applying the law to such purposes. Before proceeding to make such application, it may be well to state a few general rules of law applicable to the case, readily deducible from the authorities, and virtually conceded by all.

1. The validity of every devise or disposition of real estate by will must be governed by the law of the place where the land is situated; and this includes not only the form and

mode of the execution of the will, but also the lawful power and authority of the testator to make such disposition: Story's Conflict of Laws, sec. 474, and note; 2 Greenl. Ev., sec. 670; 1 Redfield on Wills, sec. 398, subd. 8; *Robertson v. Pickrell*, 109 U. S. 608; *White v. Howard*, 46 N. Y. 144. The importance of this proposition in considering the validity of a will covering lands in so many different states will be appreciated by all.

2. On the contrary, although not as well defined, nor as extensively enforced, yet the authorities clearly support the proposition that the validity of a bequest or disposition of personal property by last will and testament must be governed by the law of the testator's domicile at the time of his death, and this includes, not only the form and mode of the execution of the will, but also the lawful power and authority of the testator to make such disposition; and especially is this true where, as here, the testator's domicile at the time of making his will continues to be the same until the time of his death: Story's Conflict of Laws, secs. 467, 468; *Stewart v. McMartin*, 5 Barb. 438; *Moultrie v. Hunt*, 23 N. Y. 394; *Nat v. Coons*, 10 Mo. 543; *Desesbats v. Berquier*, 1 Binn. 336; 2 Am. Dec. 448; *Somerville v. Somerville*, 5 Ves. Jr. 750, 786; *Anstruther v. Chalmer*, 2 Sim. 1; *Price v. Dewhurst*, 8 Id. 279; 4 Mylne & C. 76; *Enohin v. Wylie*, 8 Jur., N. S., 897; 10 H. L. Cas. 1; *Crispin v. Doglioni*, 8 Jur., N. S., 653; L. R. 1 H. L. App. Cas. 301; *Eames v. Hacon*, L. R. 16 Ch. Div. 407; L. R. 18 Ch. Div. 347. This is not shaken by the criticism of Lord Westbury's opinion in *Enohin v. Wylie*, *supra*, by the earl of Selborne, L. C., in *Ewing v. Ewing*, L. R. 9 App. Cas. 39.

3. The same rule, as to the law of the testator's domicile, governs in the interpretation or construction of wills: Story's Conflict of Laws, secs. 479 a-479 c; *Van Steenwyck v. Washburn*, 59 Wis. 510; 48 Am. Rep. 532. In the words of Mr. Justice Story: "The language of wills is not of universal interpretation, having the same precise import in all countries and under all circumstances. They are supposed to speak the sense of the testator according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language which repels or controls such a conclusion": *Harrison v. Nixon*, 9 Pet. 504; *Trotter v. Trotter*, 4 Bligh, N. S., 502; *Enohin v. Wylie*, *supra*; *Chamberlain v. Napier*, L. R. 15 Ch. Div. 614. The general rule is the same respecting real estate,

whenever the object is merely to ascertain the meaning and intent of the testator from the language employed in the will: *Id.*; 2 Greenl. Ev., sec. 671.

With these general propositions in mind, we may, without infringing any rule of interstate comity, venture to ascertain if we can the intention of the testator as disclosed in this will, and also its validity, at least as to certain portions of the property.

4. The papers coming from the county court must be taken as the will of the testator: *Thornton v. Curling*, 8 Sim. 310; *Price v. Dewhurst*, *supra*. They consist in what has been called the will, with schedules A and B therein mentioned, and thereunto attached. In construing the will, we are to consider these three papers as one instrument in law, and together constituting the will of the testator: *Ackerly v. Vernon*, Comyn, 381; 3 Brown Parl. Cas. 91; *Hill v. Chapman*, 1 Ves. Jr. 407; *Habergham v. Vincent*, 2 Id. 204; *Jackson v. Babcock*, 12 Johns. 394; *Loring v. Sumner*, 23 Pick. 102; *Baker's Appeal*, 107 Pa. St. 381; 52 Am. Rep. 478; *Fickle v. Snapp*, 97 Ind. 289; 49 Am. Rep. 449.

5. It is claimed on the part of the executor that, under the directions of the will, all the personal property and all the real estate outside of Missouri must, for the purpose of determining the validity of the will or some of its provisions, be regarded as converted and permanently invested in lands in Kansas City, Missouri, under the well-known doctrine of equitable conversion. That doctrine is firmly established; and if it applies, or in so far as it applies, it must be enforced. It may be well to restate it, with some of its limitations. As long ago as the time of Lord Chancellor Thurlow, it was observed by him "that nothing was better established than this principle: that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given,—whether by will," or otherwise. "The owner of the fund, or the contracting parties, may make land money, or money land. The cases established this rule universally. If any difficulty has arisen, it has arisen from special circumstances": *Fletcher v. Ashburner*, 1 Brown Ch. 499. This was expressly sanctioned by the supreme court of the United States at an early day: *Craig v. Leslie*, 3 Wheat. 577. The reason for the rule is there stated by Mr. Justice Washing-

ton, speaking for the whole court, thus: "The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance and not the mere form and circumstances of agreements and other instruments, considers things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance." From that and other cases the late chief justice of this court deduced this general rule: "When a will contains a power of sale not mandatory in terms, but it is apparent from the general scope and tenor of the will that the testator intended all his realty to be sold, the power of sale will be held imperative, and the doctrine of equitable conversion applied": *Dodge v. Williams*, 46 Wis. 97; *De Wolf v. Lawson*, 61 Id. 477-479; 50 Am. Rep. 148.

In Pennsylvania it has been held "that the equitable conversion of realty into personalty, by force of a direction in a deed or will to sell, only takes place where the direction is positive and absolute; . . . that if a proposed sale is contingent or eventual in a deed or will, equitable conversion does not follow": *Neely v. Grantham*, 58 Pa. St. 437. But the better opinion seems to be as in effect held in *Dodge v. Williams*, *supra*, that whenever a direction to convert is apparent from the whole will, whether expressed or implied, then the duty and obligation to convert is imperative, and the doctrine of equitable conversion applies. Thus, in *White v. Howard*, 46 N. Y. 162, Grover, J., speaking for the court, said: "To constitute a conversion of real estate into personal, in the absence of an actual sale, it must be made the duty of, and obligatory upon, the trustees to sell it in any event. Such conversion rests upon the principle that equity considers that as done which ought to have been done. A mere discretionary power of selling produces no such result": *Power v. Cassidy*, 79 N. Y. 613, 614; 35 Am. Rep. 550; *Hobson v. Hale*, 95 N. Y. 605. So it has been held that, "where the general scheme of the will requires a conversion, the power of sale, although not in terms imperative, operates as a conversion; and this will be deemed to be immediate, although the donee of the power is vested, for the benefit of the estate, with a discretion as to the time of sale": *Lent v. Howard*, 89 N. Y. 169; *Ingrem v. Mackey*, 5 Redf. 357. But the will must, in terms or by necessary implication, disclose an intent to convert, in order to sustain the theory of equitable conversion: *Hobson v. Hale*, *supra*.

6. Having thus stated some of the principles and some of

the facts upon which the doctrine of equitable conversion rests, it becomes necessary to consider the application of those principles to some of the provisions of this will.

(a) The lands in Iowa are nowhere mentioned or referred to in the will or either of the schedules. This being so, it is manifest that the doctrine of equitable conversion has no application to them. They must therefore be regarded as lands in Iowa, and the validity of the will respecting such lands be determined by the laws of Iowa.

(b) The several pieces of land specifically described in schedule B are all situated in Kansas City, Missouri. Considering that schedule in connection with subdivision 5 of the will, of which it forms a part, as we must, and the directions thereby given to the executors are that they "shall, at" their "discretion," "either" sell the several pieces of lands so described in schedule B, and invest the proceeds thereof in more desirable rentable property in Kansas City, or use said proceeds in improving some of the testator's Kansas City properties. This mere discretionary authority can in no sense operate as an equitable conversion,—certainly not until an actual conversion should in fact occur. Besides, such conversion of the lands described, into other lands in the same city and state, could in no way affect or change their legal *status*. So they must be regarded as lands in Missouri in determining the validity of the will respecting the same.

(c) By the sixth subdivision of the will, the testator expressly directs that all moneys, notes, bonds, mortgages, or other evidence of indebtedness to him from any and all parties, except his brothers, "shall, as soon as practicable after" his death, "be used either in the purchase of property in Kansas City, or for improving properties in said city then on hand." This clause of the will relates particularly to the thirty thousand dollars of personal property in dispute; and which, for the purposes of these appeals, is assumed to be the property of the estate. The direction to so convert is not prevented from being imperative by adding "as soon as practicable after" his death, and thus giving some discretion as to the time or times of such conversion. If such permanent investment of such personal estate in lands in Kansas City can be lawfully made, and then lawfully held as lands in Kansas City during the time and for the purposes expressed in the will, then there can be no doubt but what, subject to the widow's rights therein, as hereinafter stated, the doctrine of

equitable conversion is applicable to such personal estate; and in that event, the same is accordingly to be regarded as lands in Missouri from the time of the testator's death; otherwise not. In other words, since the right to so convert is dependent upon the right to so invest and hold, the legality of such equitable conversion is dependent upon the same right to so invest and hold. Whether such investment and holding would be lawful or unlawful will be considered hereafter.

(d) The several pieces of land specifically described in schedule A consist of the homestead in Madison, Wisconsin, and lands in Michigan and Kansas. As the directions in relation to the homestead differ from the directions in relation to the other lands, the homestead will be considered by itself hereafter. Considering schedule A in connection with subdivision 4 of the will, of which it forms a part, as we must, and the directions thereby given as to the several pieces of land in Michigan and Kansas are to the effect that each and all of said pieces of land "shall be converted, as soon as practicable after" the testator's death, "at schedule prices, or as much better as may be, . . . into good, rentable, 'inside' property in Kansas City, Missouri." The testator manifestly had an exalted opinion of the present and future of Kansas City. The scheme of his will indicates an intention to have his lands in Michigan and Kansas sold as soon as practicable, and the proceeds thereof invested in real estate in Kansas City. He directs, in effect, that the several pieces of land mentioned shall be so converted as soon as practicable after his death. Is such purpose to be frustrated merely by adding "at schedule prices, or as much better as may be"? On the contrary, were not those words added as a guide to his executors, or for the purpose of stimulating purchasers to pay a larger price? It seems to us that such was his intent; for, apparently with the same view, he added to the schedule price of each piece a still larger estimated value. Of course, it may turn out to be impossible to ever sell some of the pieces at the schedule price; and yet there is nothing in the will indicating that he ever contemplated such a result, or any permanent holding of such lands as a part of the estate, as is plainly indicated as to the Missouri lands. There are no negative words indicating an intent not to have any of the lands in Michigan or Kansas sold at a less price. As indicated in another connection, some discretion may be given as

to the time or times of making such sales and investments, without preventing the application of the doctrine of equitable conversion. The only purpose manifest in the will for selling any of the Michigan or Kansas lands is to invest the proceeds of such sales in real estate in Kansas City, and then to hold such lands in that city as a part of the estate during the time and for the purposes indicated in the will. If such permanent investment can be lawfully made, and such lands so lawfully held, then we discover no reason why the doctrine of equitable conversion should not apply to them. Nevertheless, the legality of such equitable conversion is necessarily dependent upon the right to so invest and hold. Whether such investment and holding would be lawful or unlawful will be further considered hereafter. What has been thus said is not by way of determining the validity of the title to any lands outside of Wisconsin, nor the validity of any investment or trust in or tenure of such lands, but merely to ascertain the meaning and intent of the testator from the language employed in the will, which, as we have seen, is a duty devolving upon this jurisdiction.

(e) In regard to the homestead, the directions are, in effect, that it shall be converted, as soon as practicable after his death, into good rentable "inside" property in Kansas City, Missouri, "at schedule price," which is ten thousand dollars, or as much better as may be; and then, by subdivision 7 of the will, the testator directs, in effect, that his wife shall have the use of his homestead, furniture, and appurtenances so long as she may desire to live in it as her home; and that in case she at any time ceases to desire it as her home, he directs that, as soon thereafter as practicable, it be sold "at a price not less" than ten thousand dollars, or as much more as the property will bring, and the proceeds thereof be invested in good rentable property in Kansas City, Missouri, and the rentals of such property be added to the income of the estate. Here are directions to sell, and to invest the proceeds in real estate in Kansas City, it is true, but they are accompanied by other directions not to sell nor to so invest until after the concurrence of two events; one being that the widow shall cease to desire it as her home, and the other is, that it be sold at a price not less than ten thousand dollars. The word "homestead," as used in the will, manifestly means the house and all the grounds where the testator lived, and is not restricted to the one fourth of an acre mentioned in the statute: R. S.,

sec. 2983. As stated, the widow has elected to take the provisions made for her by law instead of the provisions made for her in the will, as required by the statutes: *Id.*, sec. 2172. Upon making such election, the widow at once became entitled to the same dower in the testator's lands, and the same rights to the homestead, and the same share of his personal estate, as if he had died intestate, except that the share of personal estate which she so took was restricted to one-third part of his net personal estate: R. S., secs. 2172, 3935; *Leach v. Leach*, 65 Wis. 291. Since the testator left a son as well as widow, her right to the homestead thus secured by such election is the right to such statutory homestead of one fourth of an acre during her widowhood, and dower in the balance of the land connected therewith: R. S., sec. 2271, subd. 2. In other words, the extent and duration of her right in the homestead has been diminished by such election.

Can we hold that the direction in the will to sell the homestead, and invest the proceeds as indicated, works an equitable conversion of the estate into Missouri lands? As observed, there is no such direction to convert until the widow ceases to desire it for a home. Presumably this will not occur during her widowhood, which may be regarded as equivalent to a life estate. But the sale is expressly forbidden, even after the termination of the widow's right, at any price less than that specified. To apply the doctrine of equitable conversion to lands which are directed not to be sold until the termination of such life estate, nor then, except in an uncertain event which may never occur, would be to stretch that doctrine beyond anything authorized by or contemplated in the authorities. We must therefore hold that the homestead must be regarded as lands in Wisconsin, and accordingly the validity of the will respecting the same must be determined by the laws of Wisconsin.

7. Before determining such validity, and to aid such determination, it becomes necessary to ascertain, if we can, more fully the intention and meaning of the testator as disclosed by the language employed in other parts of his will. Undoubtedly the legal title to the personal property belonging to the estate is vested in the executor: *Scott v. West*, 63 Wis. 555, 556. Of course he holds the same for the benefit of the *cestuis que trust*, including the rights of the widow, as indicated in the sections of the statute cited above. So far as the law will permit, the executor, by virtue of the will, has acquired

all the rights therein given, and is charged with all the obligations therein imposed: *Id.* The several directions in the will are addressed to him and his successors in office and his subordinates, whether by ancillary administration or otherwise. He and they are to execute the will so far as the law will permit. He and they are to pay the testator's lawful debts and funeral expenses from moneys on hand at his death, and, if they are insufficient, then the balance from the income of the estate. He and they are to pay the necessary expenses of carrying the estate from year to year, from the income thereof. The will impliedly excludes the whole of the homestead, while occupied by the widow as such, from being a source of income to the estate, but provides that in case of its conversion as indicated, then the rentals of such newly acquired property are to be added to the income of the estate.

By the election of the widow to take under the statute instead of the will, the bequest to her in the eighth subdivision of the will of "one quarter of the net annual income of the remainder" of the "estate during her natural life," which by the twelfth subdivision was to be kept up to fifteen hundred dollars from the share of the income given to the son, becomes inoperative. By such election a portion of the home property, not included in the statutory homestead nor the widow's right of dower in the balance, might be the source of a trifling income to the estate; but this would be dependent upon the validity of the provision in the will for the future conversion of the homestead, of which we shall presently speak. By the direction in the ninth subdivision of the will, the son is to have one quarter of the net annual income of the estate (exclusive of the homestead) until, under the provisions of the will, he comes into the possession of the entire estate, except as the same may be sooner terminated by his death. By the direction in the tenth subdivision of the will, the brother Edward Irving is to have one quarter of the net annual income of the estate (exclusive of the homestead) during his natural life. By the direction in the eleventh subdivision of the will, the brothers Joseph C. and Henry T. were "each" to have one eighth of the net annual income of the estate (exclusive of the homestead) during their natural lives. Such bequests annually from the "net annual income" of the estate are clearly severable, as each is independent of the other and almost necessarily must terminate at a different time than any of

the others. Since the annual share of each such legatee is each year confined to such "one quarter" or "one eighth" of such net annual income of the estate, it manifestly cannot be increased by the one quarter of such net annual income now undisposed of by reason of the election of the widow. As the undisposed of one fourth of such net annual income cannot arise from the rents, issues, or profits of lands in Wisconsin, but must arise from the rents, issues, and profits of lands outside of this state, or from the personal estate liable to be treated as converted into Missouri lands as indicated, we reserve further consideration of the question whether the accumulation of such undisposed of net annual income into the residuum of the estate would or would not be valid. Manifestly, it is the theory of the will that the several fractional shares of such net annual income thus bequeathed will from time to time be diminished, as portions of the *corpus* of the estate may pass to Marcus under the twelfth clause of the will; for, the moment he may become the absolute owner in fee of any portion of the land thereby devised, that moment such portion will become segregated from the estate, and thereby relieved from every provision of the will. So, whatever property the widow, by reason of her election, takes under the statutes of the several states, becomes in like manner segregated from the estate. It is only the one quarter or the one eighth of the net annual income of the testator's estate that is thus bequeathed; not such fractional share of the net annual income of what may become the estate of Marcus or the widow.

By the will, Marcus is to have no portion of the *corpus* of the estate, except as he becomes entitled to it under the direction in the twelfth subdivision of the will, and by such direction he is only to become the owner in fee of a portion of the *corpus* of the estate when he "reaches his majority," and then additional installments of such *corpus* from time to time until he reaches the age of forty years, when "the remainder" of the "estate" is to become his. But in the event of Marcus dying "after reaching his majority, leaving one or more legitimate children of his body," then the direction of the thirteenth subdivision of the will is, "that the income of forty thousand dollars' worth of" his "estate, or so much thereof as may in prudence be necessary, shall be used for the proper support of such child or children until they shall severally become of legal age, when an equal part of the above-named principal

and accrued interest shall become his or hers absolutely." That is to say, immediately upon the death of Marcus after so reaching his majority, and before becoming forty years of age, leaving such child or children him surviving, the forty thousand dollars' "worth of" the "estate," if there shall be so much, is to be regarded as segregated from the rest, and held in trust for them "until they shall severally become of legal age," as therein directed. "In the event" that Marcus "shall survive all" the "other legatees," that is to say, shall survive the widow and each of the three brothers, "and then die before coming into the possession" of the "whole estate," then the fourteenth subdivision of the will directs "that the remainder" of the "estate, as of that date, shall belong to Hamilton College." But the words, "the remainder of my estate," as here used, cannot mean what will be the entire estate at the time of such death of Marcus, unless it so happens that upon such death he leaves no such child or children him surviving. But in case he does leave such child or children him surviving, then such "remainder" of the estate will only be what may remain of such estate after setting apart the forty thousand dollars' worth of the estate for the benefit of such child or children, as provided in the thirteenth subdivision of the will. Such must be the construction, for, unless the words "the remainder of my estate" be so limited, the fourteenth subdivision of the will would be clearly repugnant to the provisions made for such child or children in the thirteenth subdivision, for it could not have been the intention to give as a remainder of the estate, to Hamilton College, the forty thousand dollars which might thus be set apart for such child or children.

If either the wife or one of the brothers shall become the only surviving legatee, then "in that event" the fifteenth subdivision of the will directs that the "estate at that time be divided as nearly as may be into two equal parts as regards value and renting power, and said wife or brother shall then choose between the incomes of said two properties, and have and enjoy the same during his or her natural life"; and "the other part" of the "estate shall at that date become the property of Hamilton College"; and "at the death of said wife or brother the remaining part" of the "estate shall become the property of Hamilton College." The words "my only surviving legatee," as used in this last subdivision of the will, imply, at least, that all other legatees

named in the will and living at the time of the testator's death, including Marcus, shall, previous to the time of such sole survivorship, have died leaving some portion of the *corpus* of the estate which had not before passed to the widow, to Marcus, or for the benefit of such child or children by segregation, as indicated. It may occur that all three brothers die before Marcus, or that the widow and two of the brothers die before Marcus, and then, after reaching his majority, Marcus dies, leaving one or more such children him surviving. In that event, the words, "my estate at that time be divided as nearly as may be into two equal parts," as used in the last subdivision of the will, manifestly mean only so much of the estate as may then remain after setting apart the forty thousand dollars' worth of the estate for the benefit of such child or children, as provided in the thirteenth subdivision of the will.

Such are the provisions of the will we are called upon to consider. Undoubtedly the will created in the executor an express trust, within the meaning of section 2081, Revised Statutes. In fact, he is required to do much more than to merely sell or lease lands for the benefit of legatees. He is required to do much more than merely to receive the rents and profits of lands and apply them to the use of a person during the life of such person, or for any shorter term. He is required to do much more than merely to receive the rents and profits of lands and to accumulate the same for any of the purposes and within the limits of chapter 95, Revised Statutes. He manifestly is to take, hold, and manage the estate for the beneficial interest of the several persons living and to be born as indicated. Such duties clearly imply that he is to take a legal title to the whole estate in trust for the purposes mentioned: *Scott v. West*, 63 Wis. 558-562; R. S., sec. 2086.

The will throughout deals with the estate of the testator. It uses the words "my estate," or their equivalent, some sixteen different times. It is such estate that the executor and his successor and subordinates are charged by the will with managing, converting, renting, improving, gathering, and dividing, and paying over the income annually, and from time to time segregating, and finally dividing the *corpus* of the estate, and then giving up the residuum. Subject to such segregations from time to time, they are required to so hold and manage the *corpus* of such estate until the same finally

passes wholly to the son, at the age of forty (should he live so long), twenty-eight years after the testator's death. Should he die after reaching his majority and before becoming forty, leaving one or more such children, then such executor, etc., is required to set apart the forty thousand dollars' worth of said estate, which may include the Wisconsin land, or even the whole of the remainder of the estate, and hold and manage the same until such children severally become of age. The time for such setting apart may commence soon after Marcus becomes twenty-one, or not until just before he reaches forty, and then continue twenty-one years thereafter. No one can tell how many of such children may be born, or whether any or how many may reach their majority.

Thus, according to the will, the estate, including the Wisconsin land, is liable to be so tied up from thirty to forty-eight years after the testator's death. But even if Marcus does not so die leaving such children, still, by the fourteenth and fifteenth subdivisions of the will, the estate, including the Wisconsin land, is liable to be so tied up until Marcus and the widow and the three brothers are all dead save one, either the widow or one of the brothers, as the "only surviving legatee." In other words, at least four, if not all, of these five persons, living at the time of the testator's death, must die before either of those subdivisions of the will can become operative. During such periods, or large portions of them, it is impossible to tell where the *corpus* of the estate will finally go by the terms of the will. If Marcus lives long enough, then all is to go to him. If he dies during the next nineteen years after he becomes of age, leaving children, then a large portion of it, and possibly the whole, may go to them. If he survives all the other legatees named, and then dies during that period, then a portion of it will probably go to Hamilton College; but no one can tell how much, nor, for certain, whether any. If he dies under twenty-one, even though he leave children him surviving, yet neither he, nor such children, nor his heirs at law, are to have any of such *corpus*. But even then such *corpus* is, by the will, to remain tied up during the times and for the purposes named, and only go to Hamilton College upon the occurrence of the events mentioned.

The necessity of the *corpus* of the estate being held by a trustee during such several periods and awaiting such several contingencies and possibilities, seems to be absolute: *Scott v. West, supra*. Such trustee or executor is directed to sell some

lands and buy others, but he has no authority under the will to pervert or alienate any portion of the estate in contravention of the trust: R. S., sec. 2091; *De Wolf v. Lawson*, 61 Wis. 475; 50 Am. Rep. 148. In other words, the *corpus* of the estate is inalienable during the continuance of the trust. Should the trustee die, it would become necessary to appoint a successor; and even while he lives there may be a necessity for an ancillary administration.

Under this will and our statutes, can we hold that there is no unlawful suspension of the power of alienation as to this Wisconsin land? As indicated, upon the death of the testator the widow took under the will a present life estate in that land; and she has now substantially the same under the statutes. According to the will, the executor, as trustee, took a future estate in trust in the same land, for it was "limited to commence in possession at a future day": R. S., sec. 2034; *Scott v. West*, 63 Wis. 570. "Future estates," under our statute, "are either vested or contingent": R. S., sec. 2037. "They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate": *Id.* By the terms of the will, the trustee or executor was to take such future vested estate in the homestead. As to the other property, he took a present vested estate: *Coster v. Lorillard*, 14 Wend. 302, 303. But neither Marcus nor Hamilton College had anything more than a contingent interest therein; for the statute expressly declares that such "future estates . . . are contingent while the person to whom, or the event upon which, they are limited to take effect remains uncertain": R. S., sec. 2037. "These definitions of vested and contingent remainders," said Savage, C. J., "are very different from the common-law definitions of those estates": *Coster v. Lorillard*, 14 Wend. 301. They took no vested interest in the land, and could convey none: R. S., secs. 2086, 2089; *De Wolf v. Lawson*, 61 Wis. 475, 476; 50 Am. Rep. 148. Under our statute "every future estate," whether vested or contingent, is "void in its creation," which "suspends the absolute power of alienation . . . for a longer period than during the continuance of two lives in being at the creation of the estate," etc.: R. S., secs. 2038, 2039; *De Wolf v. Lawson*, 61 Wis. 473; 50 Am. Rep. 148. The only exception to this, which is in section 2040, is clearly not applicable here.

To avoid all uncertainty, one of the same sections declares

that such "absolute power of alienation shall not be suspended by any limitation or condition whatever," and the other declares that "such power is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed." Since the trustee cannot, under the will, relinquish the trust, which includes the "possession," until the purposes of the trust are fulfilled as the several periods for such fulfillment transpire; and since persons are liable to be born, who, by the terms of the instrument, will be entitled to a large portion, and possibly the whole, of what may then remain of the estate, including this homestead,—it is very obvious that "there are no persons in being by whom an absolute fee in possession can be conveyed," within the meaning of the statutes; and since this state of things must, under the will, continue for a longer period than two lives in being at the creation of the estate, such suspension, as to this homestead, must be adjudged contrary to the statute, and therefore absolutely void: *Coster v. Lorillard*, 14 Wend. 317-324; *Hawley v. James*, 16 Id. 121, 122, 164, 165, 174-179.

It is impossible to escape this conclusion by speculating as to the probabilities of Marcus and his unborn children eventually getting this Wisconsin land under the will. We have no authority to speculate upon the chances. The rule is universal that such suspension of the power of alienation must necessarily terminate, under any and all circumstances, within the period prescribed by the statute, or the disposition will be void: *Schettler v. Smith*, 41 N. Y. 328; *Knox v. Jones*, 47 Id. 397. Nor is it possible to escape such conclusion on the theory that the trustee or executor merely has a power in trust to sell such homestead; for, as indicated, neither the future estate of Marcus nor Hamilton College therein is anything more than contingent under our statutes. We must, therefore, hold that the attempted disposition of the homestead by the will is void, and that upon the death of the testator the same descended to Marcus, subject to the widow's rights therein, as indicated under the statutes.

8. It is strenuously urged, in effect, that, as the testator's residence and domicile were in this state at the time of making his will and his death, he could thereby create no valid trust except such as is sanctioned by the laws of this state. In other words, that he could not by such a will, under the doctrine of equitable conversion, cause his personal property and his lands in Michigan and Kansas to be converted into lands

in Kansas City, Missouri, and there held as his estate, and the power of the alienation thereof suspended beyond the time authorized by our statutes, even though such suspension would be valid under the laws of Missouri; and that the question as to the validity of such suspension is properly determinable by this jurisdiction. I frankly confess that I was deeply impressed upon the hearing with the plausibility and force of this argument. The will was here admitted to probate. The executor here qualified and received his commission from the county court. He is directly accountable to and subject to the orders of that court. There may, necessarily, be ancillary administrations in other states, but they will in law be subordinate to this, which must be regarded as the principal administration. But in such intricate matters of title and jurisdiction, impressions are of no value, unless supported by the logic of the law, if not by authority.

In *Curtis v. Hutton*, 14 Ves. Jr. 537, cited by counsel, the testator devised real estate in England in trust to be sold, and the proceeds of the sale, with the personal estate upon trust, to be laid out in lands for the maintenance of a charity in Scotland, and it was held void as to the real estate, but valid as to the personal property, by the effect of the option. The reason for holding such devise of such real estate in England void, as given by Sir William Grant, master of the rolls, was that "the owners of such property are disabled from disposing of it to any charitable use, except by deed executed twelve months before the death of the owner, etc., to take effect from the execution": *Id.* 541. Such disability of otherwise disposing of such land was held, in effect, could not be frustrated by the doctrine of equitable conversion. That decision is the foundation of section 479 d of Story's Conflict of Laws, which cannot be regarded as of any greater authority; nor does it squarely meet the question here presented. Nine years after that decision, the same learned master of the rolls, in a case where the testator by his will directed his executors to dispose of all his real and personal property at Grenada, in the West Indies, and remit the proceeds to England, to be laid out as a charitable fund in the best manner possible, held that such directions were not void, as the statute of mortmain did not extend to Grenada: *Attorney-General v. Stewart*, 2 Mer. 143.

In *Attorney-General v. Mill*, 2 Dowl. & C. 393, the testator, by his will, made in England, where he was at the time domiciled, and so remained until his death, gave his personal and

real estate (none of the latter being in England or Scotland, but in the West Indies) to trustees, to be laid out in the purchase of lands or rents of inheritance in fee-simple, for a charitable purpose, at Montrose, in Scotland, and it was held by the house of lords, affirming the decree of the chancellor, "that the bequest was void by the statute of mortmain, it not appearing from the will that the testator intended that the trustees should have the option to purchase lands in Scotland." The plain inference from the opinion is, that had the will directed the purchase of the lands in Scotland, then it would have been valid, as the law there did not prevent such purchase.

In *Fordyce v. Bridges*, 2 Phil. Ch. 515, Lord Chancellor Cottenham, speaking of this subject, said: "An objection was made that the bequest of a fund to be invested in a regular Scotch entail was void as a perpetuity. The rules acted upon by the courts in this country, with respect to testamentary dispositions tending to perpetuities, relate to this country only. What the law of Scotland may be upon such a subject, the courts of this country have no judicial knowledge, nor will they, I apprehend, inquire; the fund being to be administered in a foreign country is payable here, though the purpose to which it is to be applied would have been illegal if the administration of the fund had been to take place in this country. This is exemplified by the well-established rule in cases of bequests within the statutes of mortmain. A charity legacy void in this country under the statute of mortmain is good and payable here if for a charity in Scotland. . . . The objection raised upon the ground of perpetuity cannot be maintained." This seems to be peculiarly applicable to the personal estate here.

It is said that *Freke v. Lord Carbery*, L. R. 16 Eq. 461, is to the contrary. In that case, the testator was a domiciled Irishman in Ireland, who, after disposing of personal estate in trust, "gave his leasehold house in Belgrave Square, England, to the same trustees, upon trust to sell" as directed, and to apply the proceeds in discharge of any encumbrance on the same, and the residue to invest in government or real securities, and hold the same upon such trusts as declared. "The validity of the trusts for accumulation was not disputed, so far as they related to the testator's government stocks and funds, and other pure personalty. But the question was raised whether these trusts were valid as to the proceeds of the sale of the house in

Belgrave Square," and it was held that "the Thellusson act applied to the English leasehold, and the proceeds of the sale thereof, and that the trust for accumulation of the investments of the proceeds of the sale in excess of the periods permitted by that act was invalid." This is clearly distinguishable from the other cases cited, and is an authority to the point that the law of the place where the land is situated governs as to the validity of its disposition by will, instead of the law of the testator's domicile, as here claimed.

In the celebrated case of *Hawley v. James*, 5 Paige, 337, 16 Wend. 74, 381, 7 Paige, 213, 32 Am. Dec. 623, the testator was domiciled in Albany, New York. By his will he directed all his lands outside of New York City, Albany, and Syracuse, including forty thousand acres in the state of Illinois, to be sold, and the proceeds thereof to be invested in lands in the three cities named, upon trusts which, under the statutes like ours cited, were held void. But in respect to any lands of the testator situated in the state of Illinois, or elsewhere outside of the state of New York, the decree which was entered by the court of errors stated that it was not to be deemed a decision upon the title of the said trustees to those lands, or their power over them (16 Wend. 281), which question was thereby remitted for further consideration to the court of chancery. Upon the cause being remitted to the chancellor, an application was made for further directions in pursuance of such decree. Upon a full hearing, the learned chancellor said: "This court has no jurisdiction to make a decree which will directly affect either the legal or equitable title to lands situated in another state. And if the legal title to the lands now in question was in any of the infant parties according to the laws of Illinois, or if those who had the legal title were out of the jurisdiction of this court, so that it would be impossible for it to operate upon them personally to compel them to execute the trust or to convey the legal title according to the decree, I should consider it my duty to dismiss the application, and to refer the parties to the courts of the state where the trust property is situated." Then, after showing that the will had been executed in conformity to the laws of Illinois so as to vest the legal title to the lands in that state in the trustees, and that as the object of the testator in directing a sale of the Illinois lands and a conversion of the same into money was to buy lands in the state of New York, and hold them upon trusts which were contrary to the statutes of that

state and therefore illegal, the trustees were deemed to hold the title to the Illinois lands in trust for the heirs; and as the trustees were all within the jurisdiction of the court, they were accordingly directed to convey the same to the heirs: 7 Paige, 213.

In *Burrill v. Sheil*, 2 Barb. 457, the testator domiciled in New York directed lands in that state to be sold, and a portion of the proceeds invested in England; and as no law was thereby violated, it was held that the courts of New York had no power to divert the investment from England and direct the same to be made in New York, except with the consent of all the parties interested; and as some were infants, such consent could not be obtained.

In *Bascom v. Albertson*, 34 N. Y. 584, a bequest by a New York testator was made to five such persons as the supreme court of Vermont should appoint to be trustees, to found, establish, and manage an institution for the education of females, to be located at Middlebury, Vermont, and it was held ineffectual for any purpose, since the object of the bequest was unlawful in the state of the testator's domicile. This is in harmony with the second proposition announced in this opinion.

In *Chamberlain v. Chamberlain*, 43 N. Y. 424, the testator was domiciled in the state of New York, and among other things he bequeathed a certain amount to the "Centenary Fund Society, a corporation created under the laws of Pennsylvania for charitable and benevolent purposes." In passing upon its validity the court held that "the law of the testator's domicile controls as to the formal requisites essential to the validity of the will, the capacity of the testator, and the construction of the instrument. When by the *lex domicilii* a will has all the formal requisites to pass title to personalty, the validity of particular bequests will depend upon the law of the domicile of the legatee, except in cases where the law of the domicile of the testator in terms forbids bequests for any particular purpose or in any particular manner, in which latter case the bequest would be void everywhere." The learned justice giving the opinion said: "So far as the validity of bequests depends upon the general law and policy of the state affecting property and its acquisition generally, and relating to its accumulation and a suspension of ownership, and the power of alienation, each state is sovereign as to all property within its territory, whether real or personal. It is no part of the policy of the state of New York to interdict perpetuities or

gifts in mortmain in Pennsylvania or California. Each state determines those matters according to its own views of policy or right, and no other state has any interest in the question; and there is no reason why the courts of this state should follow the funds bequeathed to the Centenary Fund Society to Pennsylvania to see whether they will there be administered in all respects in strict harmony with our policy and our laws": *Id.* 434. To the same effect is *Mapes v. American H. M. Soc.*, 33 Hun, 360; *Bible Soc. v. Pendleton*, 7 W. Va. 79.

This case of *Chamberlain v. Chamberlain*, *supra*, is in harmony with subsequent decisions in the same state in which it has been held, in effect, that in the absence of any equitable conversion, the question as to the unlawful suspension of the power of alienation of lands in New York must be governed by the laws of that state, notwithstanding the testator who attempted to dispose of the same was at the time of making his will and his death domiciled in some other state, as, for instance, in Connecticut, Massachusetts, or California, as will appear by *White v. Howard*, 46 N. Y. 144; *Despard v. Churchill*, 53 *Id.* 192; *Hobson v. Hale*, 95 *Id.* 588. The only case cited which seems to be in conflict with the principles stated is *Wood v. Wood*, 5 Paige, 596. But that is expressly overruled in *Chamberlain v. Chamberlain*, 43 N. Y. 435, and impliedly so in other cases.

It is unnecessary to look further into the authorities. The difficulty in holding that the laws and courts of this state may interdict the conversion of personal property into lands in Missouri, or lands in Michigan or Kansas into lands in Kansas City, is apparent when we remember that the laws of this state have no extraterritorial force, and the courts of Wisconsin have no extrastate jurisdiction. The principles of law thus indicated are in strict harmony with the rulings of this court in *Van Steenwyck v. Washburn*, 59 Wis. 510, 511.

We must therefore disclaim jurisdiction to determine the title to any of the lands outside of Wisconsin, or the legality of accumulations of rents and profits therefrom. It follows that the validity of the proposed conversion of personal property into lands in Kansas City must be determined by the laws and courts of Missouri. So the question of the validity of the proposed conversion of lands in other states into lands in the same city would seem to be determinable by the same jurisdiction; but of this we have no authority to decide. Such questions of the validity of such conversions should be

determined at an early day, by instituting the proper suit in the proper jurisdiction.

The costs and disbursements of all parties in this court and the circuit court are payable out of the estate. The county court will make such allowance to the respective parties of the estate for counsel fees as, in the exercise of a sound discretion, may be just.

By the COURT. The judgment of the circuit court is reversed on each of the four appeals, and the cause is remanded, with directions to enter judgment in accordance with and to the extent indicated in this opinion, but leaving open for further action the questions as to the validity of such conversions, suspensions, and accumulations, until authoritatively determined by the rightful jurisdiction.

EQUITABLE CONVERSION OF REAL ESTATE INTO PERSONAL, AND PERSONAL ESTATE INTO REAL, BY WILL. — The doctrine of equitable conversion is one which is entirely a creation of and depends wholly upon the rules of equity; and in the determination of questions relating thereto, courts of equity have sole jurisdiction, except in those cases where the doctrine is recognized and followed in courts of probate, and others of like character, in the settlement and distribution of estates of decedents: 3 Pomeroy's Eq. Jur., sec. 1159. The principle which underlies this doctrine is, that "equity regards that as done which ought to be done": *Craig v. Leslie*, 3 Wheat. 562, 578; 1 Jarman on Wills, 5th ed. by Bigelow, 584. It is so well established as to be at this time beyond controversy that an estate will be considered as of that kind of property into which it is directed to be converted; that is, a direction in a will to convert realty into money operates as an equitable conversion, and the realty is thereafter to be deemed personalty in equity; and money directed to be converted into land is, in equity, considered as such for all intents and purposes, and passes therefore by devise, and descends to the heir: *Branhall v. Ferris*, 14 N. Y. 41; 67 Am. Dec. 113; *Green v. Stephens*, 17 Ves. 64, 77; *Rankin v. Rankin*, 36 Ill. 293; 87 Am. Dec. 205; *Loftes v. Glass Ex'r*, 15 Ark. 680; *Beadle v. Beadle*, 2 McCrary, 586; *Collins v. Champ's Heirs*, 15 B. Mon. 118; 61 Am. Dec. 179; *Miller v. Commonwealth*, 111 Pa. St. 321; *Best v. Stamford*, 1 Salk. 154; *Hawley v. James*, 5 Paige, 318, 443; *Biddulph v. Biddulph*, 12 Ves. 161; *Green v. Johnson*, 4 Bush, 164. So "a devise of land which a testator by his will directs to be purchased will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made": *Craig v. Leslie*, 3 Wheat. 562, 577; and land is considered in equity as converted into personalty by a direction in a will that it shall be sold, and from the proceeds thereof a fund established for the payment of debts and legacies: *Proctor v. Ferebee*, 1 Ired. Eq. 143; 36 Am. Dec. 34; *Craig v. Leslie*, 3 Wheat. 562, 582. This rule is further instanced by the case of *Smilie v. Biffle*, 2 Pa. St. 52, 44 Am. Dec. 156, which decides that land should be regarded as money when devised to trustees to be sold, and the proceeds applied to the use of one for life, and afterwards distributed among certain parties in remainder; so a devise must be treated as of money and not of land, when by the provisions of a will real estate is to be converted

into money, and that money distributed among the devisees; nor does it make any difference in this respect that the legal title descended to the devisees to whom the money is to be paid when the land is sold: *Baker v. Copenbarger*, 15 Ill. 103; 58 Am. Dec. 600, and see note 604. And where a testator directs his executor to sell all his real and personal estate and pay over the proceeds to his son's guardians, whom he directs to use the interest for the support and education of his son, and to pay him the principal on his attaining his majority, such realty will be considered as having been by the directions of the will converted into money, although it was never sold by the executors: *Burr v. Sim*, 1 Whart. 252; 29 Am. Dec. 48. But land directed to be sold does not change its character where some one having a right so to do elects to take it as land: *Tazewell v. Smith*, 1 Rand. 313; 10 Am. Dec. 533. Nor is real estate converted into personalty where it is merely directed to be sold upon a certain condition; but if a valid sale is made, the surplus proceeds must be treated as personalty: *Evans v. Kingsberry*, 2 Rand. 120; 14 Am. Dec. 779. And a conversion into real of personal estate necessary to perfect improvements of intestate's real estate does not take place where the improvements were not intended to be made as an investment, but merely incident to an object which ceased to exist upon the death of the intestate: *Gray v. Hawkins's Adm'rs*, 8 Ohio St. 449; 72 Am. Dec. 600. So a direction that lands be converted into money, and the proceeds divided between certain persons, creates no charge upon the fund for the payment of debts, but the beneficiaries take as devisees, and their bequests will be liable for the testator's debts only after the exhaustion of the personal estate: *Newby v. Skinner*, 1 Dev. & B. Eq. 488; 31 Am. Dec. 397. Again it was decided in *Hooper v. Goodwin*, 18 Ves. 156, 166, that there can be no such a conversion by will of real estate into personal as to allow the testator to directly dispose of the same by an unattested codicil: *Hooper v. Goodwin*, 18 Ves. 156, 166.

TESTATOR'S INTENTION THE DETERMINING FACTOR AS TO WHETHER CONVERSION SHOULD TAKE PLACE. — The principle indicated by this subdivision of the question under consideration is well illustrated and stated by the case of *King v. King*, 13 R. I. 501. There, a clause of the testator's will provided that the residue of his estate remaining after the payment of certain legacies should go to certain trustees, who were vested with authority to sell at their discretion any of the trust property, but the legatees had also under said will the right to take realty for and in place of the amount of their several bequests, and in said residuary clause the words "give, devise, and bequeath" were used. It was decided that the real estate was not to be regarded as having been equitably converted, and the court in arriving at such determination said that the question whether the clause in question worked an equitable conversion of the real estate into personalty is, "What was the testator's intention? the rule being that in equity the property will be treated as being already what it was intended to become. . . . Did the testator intend an absolute out and out conversion, or only to give the trustees the power to convert, to be used or not according to their discretion? The rule for the decision of such a question as stated — and in our opinion correctly stated — by Judge Story is, that 'in general courts of equity do not incline to interfere to change the quality of the property, as the testator or intestate has left it, unless there is some clear act or intention by which he has unequivocally fixed upon it throughout, — a definite character either as money or as land': 2 Story's Eq. Jur., sec. 214; or as the rule is elsewhere laid down; for the will to operate as an immediate conversion, it must ap-

pear in terms or by necessary implication that the testator intended the property to be converted absolutely and at all events."

CONVERSION MAY TAKE PLACE BY EXPRESS WORDS OR BY IMPLICATION. — This rule is well settled, and is substantially an extended application of the doctrine of intent stated *supra*: *Fletcher v. Ashburner*, 1 Brown Ch. 497. The rule as laid down in Pennsylvania is, "that in order to work a conversion, there **must** be either, — 1. A positive direction to sell; or 2. An absolute necessity to sell in order to execute the will; or 3. Such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money. In each of the two latter cases an intent to convert will be implied": *Hunt's and Lehman's Appeals*, 105 Pa. St. 128, 141; and in New York it is declared that where the testator's intent is not directly and definitely expressed, then the provisions of the will taken together must be such as to leave no doubt of the testator's intent: *Hobson v. Hale*, 95 N. Y. 588, 597; *Neely v. Grantham*, 58 Pa. St. 433. So, "where the general scheme of the will requires a conversion, a power of sale operates as a conversion, although not in terms imperative": *Lent v. Howard*, 89 N. Y. 169; *Phelps's Ex'r v. Pond*, 23 Id. 69; *Hereford v. Ravenhill*, 5 Beav. 51; *Power v. Cassidy*, 79 N. Y. 602; *Cookson v. Cookson*, 12 Clark & F. 121; 3 Pomeroy's Eq. Jur., sec. 1160; *Fisher v. Banta*, 66 N. Y. 468; *Page's Estate*, 75 Pa. St. 87; *Gould v. Taylor Orphan Asylum*, 46 Wis. 106; *Wurt's Ex'rs v. Page*, 19 N. J. Eq. 365. And where, as in the principal case, an executor is named in the will, and the testator directs therein that the estate shall be sold without declaring by whom such sale shall be made, the executor will take a power of sale by implication: *Magruder v. Peter*, 11 Gill & J. 217; *Peter v. Beverly*, 10 Pet. 533; *Taylor v. Benham*, 5 How. 233. But a direction that the residue and remainder of the testator's estate, both real and personal, should be and remain in the care and custody of the executors well and safely invested, and which does not otherwise direct any change in the character of the estate, nor state the nature of the investments to be made, or the manner of making them, does not work by implication an equitable conversion: *Hobson v. Hale*, 95 N. Y. 588. Nor does a power to sell arise by implication where the land is to be equally divided among the legatees by "sale or otherwise, as may be deemed best": *Dunlap v. Pyle*, 5 McLean, 322. And no such conversion is implied where lands are charged only with the payment of debts: *In the Matter of the Will of Fox*, 52 N. Y. 530, 537.

POWER OF SALE MUST BE ABSOLUTE AND IMPERATIVE, AND NOT DISCRETIONARY, in order to operate as a conversion: *Cooke v. Platt*, 98 N. Y. 35; 3 Pomeroy's Eq. Jur., sec. 1160. This is a broad statement of the principle, and is the general rule, subject to certain exceptions hereinafter noted. The rule is less broadly stated as follows: A mere power to sell does not operate as a conversion; to do this, the duty to sell must be imperative: *In the Matter of the Will of Fox*, 52 N. Y. 530, 537; *Harris v. Clark*, 7 Id. 242. Therefore, a mere discretionary power to sell does not operate as a conversion: *Perot's Appeal*, 102 Pa. St. 235, 255; or, "if the act of converting . . . is left to the option, discretion, or choice of the trustees, or other parties, then no equitable conversion will take place, because no duty to make the change rests upon them"; but this option or discretion refers to the very act of changing the form of the property: 3 Pomeroy's Eq. Jur., sec. 1160; citing, among numerous other cases, *Hood v. Hood*, 85 N. Y. 561; *Prentice v. Jansen*, 79 Id. 478; *Peterson's Appeal*, 88 Pa. St. 397; *Jones v. Caldwell*, 97 Id.

42; *McClure's Appeal*, 72 Id. 414; *Pratt v. Taliaferro*, 3 Leigh, 419; *Dodge v. Williams*, 46 Wis. 70; *Jones v. Throckmorton*, 57 Cal. 368.

Exceptions to the Above Rule.—A distinction is made and recognized in *Perol's Appeal*, 102 Pa. St. 235, 256, between cases where a mere discretionary power of sale is given and those where such power becomes imperative after a time, and the legatees are given the proceeds only, and not the estate itself. In which latter case, the execution of the power becomes compulsory, in order to prevent the object of the testator being defeated. Here there is a conversion. So a discretion as to time or manner does not prevent the conversion from operating: *Tazewell v. Smith's Adm'r*, 1 Rand. 313; *Stagg v. Jackson*, 1 N. Y. 206; examine *Christler's Ex'r v. Meddis*, 6 B. Mon. 35. And where the fund is to be invested in real or personal estate, according to the discretion of the trustees, but the construction of the whole will shows an intention to invest said fund in real estate, it is regarded as real estate, although never invested: *Cowley v. Hartstonge*, 1 Dow, 361. So if the discretion is exercised, and the property actually converted, the property passes in the form into which it is converted: *Bourne v. Bourne*, 2 Hare, 35; *White v. Howard*, 46 N. Y. 144; *Van Vechter v. Keator*, 63 Id. 52. And if, after land is directed to be sold, the executors are then vested with a discretionary power to convey a portion to a legatee in satisfaction of a pecuniary legacy, such conversion is not avoided by such discretion, the land, when conveyed, being considered as taken by purchase: *Miller v. Commonwealth*, 111 Pa. St. 321; *Pyle's Appeal*, 102 Id. 317, 321.

Again, where a testator directs his real estate to be sold and the money arising therefrom to be paid to particular persons, the interest of the legatee is a vested one, as much as if the land itself had been devised, although the executor may have a discretion as to the time of selling, and although the estate to be sold is only a remainder: *Tazewell v. Smith*, 1 Rand. 313; 10 Am. Dec. 533; and a direction that property be sold as soon as it could be done with advantage was decided to work a conversion of the real estate into personalty: *Pyle's Appeal*, 102 Pa. St. 317, 320. In *Moncrief v. Ross*, 50 N. Y. 531, it was determined that where real estate is, under the direction of a will, to be sold directly after the termination of a life estate in favor of A, and A dies before the testator, such direction is absolute, and the land is equitably converted into money. So land directed by the testator to be sold upon the happening of a certain event, and the proceeds to be divided among his children and their heirs, becomes personal estate upon the happening of that event: *Brothers v. Cartwright*, 2 Jones Eq. 113; 64 Am. Dec. 563. But if the intention of the testator is that the power to convert should only be given, and the executor or trustee is clothed with a discretionary power as to such conversion, then, in such case, the conversion "will not be regarded as consummated in law until it is consummated in fact": *King v. King*, 13 R. I. 501; citing *Cook's Ex'r v. Cook's Adm'r*, 20 N. J. Eq. 375; *Bourne v. Bourne*, 2 Hare, 35, 38; *Arnold v. Gilbert*, 3 Sand. Ch. 531, 533, 556; *Dominick v. Michael*, 4 Sand. 374; *Harris v. Clark*, 7 N. Y. 242, 260; *Anewalt's Appeal*, 42 Pa. St. 414; *Chew v. Nicklin*, 45 Id. 84; see also *Attorney-General v. Mangles*, 5 Mees. & W. 120; *Wright v. Trustees of Meth. Epis. Church*, Hoff. 202. In *Marsh v. Love*, 42 N. J. Eq. 112, 114, the executors were directed under the will to sell all the real and personal estate, "such sale or sales to be made in one year after my decease, and sooner, if deemed desirable by them," and to devote the proceeds to the payment of certain bequests. It was decided that "the rule of construction of such power is, that the limitation is directory merely, unless it appears from the will that

the testator intended that it should be of the essence of the power," and that "where it is merely directory, the power may be executed after the expiration of the limited period; but where the limitation is of the essence of the power, the power must be executed within the prescribed period"; citing Perry on Trusts, sec. 771; *Pearce v. Gardner*, 10 Hare, 287; *Cuff v. Hall*, 1 Jur., N. S., 972; *Shalter's Appeal*, 43 Pa. St. 83; *Chasman v. Bucken*, 37 N. J. Eq. 415. The words of the court in *Wright v. Trustees of Meth. Epis. Church*, Hoff. 202, 218, furnish a very good summary of the doctrine; they are as follows: "The *criteria* which the authorities upon the subject of conversion furnish are these, — whether the will has prescribed a sale absolutely and at all events, for all purposes, not merely for the purposes of the will, irrespective of all contingencies, and independent of all discretion. If the sale is to be made for a special purpose, or the general purposes of the will, and these purposes fail, conversion does not take effect; if it is to be made on a given event, it depends upon the occurrence of that event; if the disposition is left to the discretion of the grantee of the power, the will is not imperative, and does not convert the estate."

CONVERSION TAKES PLACE FROM THE TESTATOR'S DEATH as a general rule, and not till then: *Hammond v. Putnam*, 110 Mass. 232, 235, 237; *Robinson v. Robinson*, 19 Beav. 495; *Beauclerk v. Mead*, 2 Atk. 167; *Brothers v. Cartwright*, 2 Jones Eq. 113; 64 Am. Dec. 563; *Van Vechten v. Van Vechten*, 8 Paige, 106, 124, 129; *Martin v. Sherman*, 2 Sand. Ch. 341; *Ward v. Arch*, 15 Sim. 389; *Stagg v. Jackson*, 1 N. Y. 206; *Reading v. Blackwell*, Bald. 166; and the conversion "will be deemed to be immediate, although the donee of the power is vested for the benefit of the estate with a discretion as to the time of sale": *Lent v. Howard*, 89 N. Y. 169, 177. So where a testator devises his realty to his executors in trust to sell and to apply the proceeds to certain uses, the property becomes personalty immediately upon the testator's death for all the purposes of the disposition as effectually as if the testator had himself sold the land and bequeathed the proceeds in the same way: *Kane v. Gott*, 24 Wend. 641; 35 Am. Dec. 641, and note 651. But where the executor is not vested with any discretion, and it is directed that such actual conversion shall not take place until after the death of the widow or life tenant, the subject-matter does not then exist at the testator's death in the shape and form in which it was given; the equitable conversion only takes place from the time the sale was directed to be made: *Vincent v. Newhouse*, 83 N. Y. 505, 511, 512. Professor Pomeroy, in his learned work on equity jurisprudence, states the general rule as herein given, but modifies it somewhat. He says (volume 3, section 1162), the time from which the conversion takes place, "like all other questions of intention, must ultimately depend upon the provisions of the particular instrument. The instrument might in express terms contain an absolute direction to sell or to purchase at some specified future time, and if it created a trust upon the happening of a specified event, which might or might not happen, then the conversion would only take place from the time of the happening of that event, but would take place when the event happened exactly as though there had been an absolute direction to sell at that time": See also *McClure's Appeal*, 72 Pa. St. 414. It should be added in this connection that the property is treated in equity, from the time of the conversion, as of the kind and form into which it is converted; and the rights of the parties thereto are determined with relation to the character into which it is changed: 3 Pomeroy's Eq. Jur., sec. 1164. But prior to such time it retains its original character unchanged. This rule is stated in *King v. King*, 13 R. I. 501, where it is said that if it is intended

that the conversion shall be for certain purposes only, the property will be treated as converted for those purposes, and beyond that it will be regarded as remaining unchanged; citing *Ackroyd v. Smithson*, 1 Brown Ch. 503; *Gruse v. Barley*, 3 P. Wms. 20; *Chitty v. Parker*, 2 Ves. Jr. 270; *Taylor v. Taylor*, 3 De Gex, M. & G. 190; 21 Eng. L. & Eq. 363; *Cooke v. Dealy*, 22 Beav. 196, 199; see also *Wright v. Trustees of Meth. Epis. Church*, Hoff. 202. Extending the principle declared in the first clause of *King v. King*, as above given, a devise in trust for the support and education of the testator's children until the youngest should arrive at a certain age, when the same was to be equally divided among certain legatees, followed by a clause authorizing the executor to sell so much of the estate as should be necessary to pay his debts, limits the power of the executor to sell to the express purpose of paying said debts, and does not extend it by implication to the power of selling the whole estate: *Brome v. Pembroke*, 66 Md. 193, 195; and where real estate is directed to be converted into personal estate for certain purposes, it can only be conveyed as real estate until actual conversion: *Wilder v. Ranney*, 95 N. Y. 7.

TOTAL AND PARTIAL FAILURE OF THE PURPOSES INDICATED IN THE WILL. — Upon a total failure of the purposes for which such conversion was directed, the property so intended to be converted will retain the character in which it originally existed, as in case where the directions of the will were, that the testator's real estate should be sold and should be considered personal estate "for the purpose of distribution." It was then given with other personal estate to certain legatees with a final limitation to "his own right heirs, and next of kin." There was no absolute conversion, and the limitation having failed, it was determined that the produce of the realty should go to the heir: *Edwards v. Fuch*, 23 Beav. 268; see also *Smith v. Claxton*, 4 Madd. 484, 492; *Girard v. Girard*, 58 How. Pr. 175; *Ackroyd v. Smithson*, 1 Brown Ch. 503; *Davis's Appeal*, 83 Pa. St. 348; *Craig v. Leslie*, 3 Wheat. 563, 582; *Bogert v. Hertell*, 4 Hill, 492; *Wood v. Cone*, 7 Paige, 471, 476; *Pennell's Appeal*, 20 Pa. St. 515; *Slocum v. Slocum*, 4 Edw. Ch. 613; *Pratt v. Taliaferro*, 3 Leigh, 419, 423; and examine *Evans's Appeal*, 63 Pa. St. 183; *Rizer v. Perry*, *Howard v. Perry*, 58 Md. 112. Where there is a partial failure of the purposes intended by such conversion, then it would be necessary that a conversion should be made to effectuate the testator's purposes which are capable of taking effect, and as to the overplus remaining, unless it appears that the testator actually intended that such produce of the real estate should be taken as personalty at all events, whether the purposes intended take effect or not, then such overplus as the will does not effectually dispose of at the testator's death goes to the heir: *Ackroyd v. Smithson*, 1 Brown Ch. 502, and note; *Fletcher v. Ashburner*, 1 Id. 495; *Lloyd v. Hart*, 2 Pa. St. 473; 45 Am. Dec. 612; 3 Pomeroy's Eq. Jur., sec. 1171, and note where it is said that "the tendency of some at least of the American cases is not so strongly in favor of the heir"; and cites *Craig v. Leslie*, 3 Wheat. 563; *Morrow v. Brenizer*, 2 Rawle, 185; *Burr v. Sim*, 1 Whart. 252; and see *Evans v. Kingsbury*, 2 Rand. 120; 14 Am. Dec. 779; as to the rule in cases of total or partial failure of the purposes intended by the testator, where money is directed to be converted into land, it is said in the leading case of *Hawley v. James*, 5 Paige Ch. 318, 444, — and the rule would seem equally applicable to the produce of real estate, — that "where the object of the conversion fails either wholly or in part, whether such failure be occasioned by the incapacity of the devisee or legatee to take, or because of the illegality of the disposition attempted to be made of the converted property, or of any particular estate or interest

in such property, or from any other cause, there will be a resulting use or trust, or estate in the property, or in so much thereof as is not legally or effectually disposed of, in favor of those who would have been entitled to such property if the conversion thereof had not been directed by the will." See also *Head v. Godlee*, John. 536; *Cogan v. Stevens*, 1 Beav. 482, note. So where real estate was directed to be sold and the proceeds given to certain parties, and said bequests were void, it was decided that the realty had not been converted into personalty so as to enable it to pass in that character to residuary legatees: *Rizer v. Perry*, *Howard v. Perry*, 58 Md. 112.

ELECTION TO HAVE THE PROPERTY IN ITS UNCONVERTED STATE. — As a rule, subject to the qualifications hereinafter made, those entitled to the proceeds of the sale of land may in ordinary cases take the land itself: *Proctor v. Ferree*, 1 Ired. 143; 36 Am. Dec. 34; but in general it may be stated that only those who are not incapacitated, *sui juris*, from dealing with their own property effectively, may elect to have a reconversion; and where the interest of a person properly qualified to so elect is absolute and wholly vested in himself, there is no doubt of his right to so elect, no matter whether the conversion intended was that of land into money or money into land: *Sisson v. Giles*, 32 L. J., N. S., Ch. 606; *Benson v. Benson*, 1 P. Wins. 130; *Seeley v. Jago*, 1 Id. 389; *Ashby v. Palmer*, 1 Mer. 296; *High v. Worley*, 33 Ala. 196; *Briggs v. Chamberlain*, 11 Hare, 69; *Oldham v. Hughes*, 2 Atk. 452, 453; *Baker v. Copenbarger*, 15 Ill. 103; 58 Am. Dec. 600; *Pratt v. Taliaferro*, 3 Leigh, 419, 429; *Shallenberger v. Ashworth*, 25 Pa. St. 152; *Samuel v. Samuel*, 4 B. Mon. 245, 257; *Turner v. Dawson*, 80 Va. 841, 849; *Commonwealth v. Martin*, 5 Munf. 117, 126; 3 Pomeroy's Eq. Jur., sec. 1176. Where there are more persons than one entitled to have such election, all of them must join in the election; otherwise it is nugatory: *Evans's Appeal*, 63 Pa. St. 183, 186; and one of several may not elect where his election would injuriously affect the interests of those associated with him in the right to such estate: 3 Pomeroy's Eq. Jur., sec. 1177; and "when the direction is to turn land into money, one co-owner cannot elect to keep his share in land," since the others are entitled to have the whole undivided portion sold so as to realize as much money as possible: *Id.*, note 1. It was held in *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600, that devisees may elect to take land itself instead of money if all are competent to elect, where a devise is made of money to be produced by the sale of land, but that the character of the devise cannot be thus changed from money to land except by the concurrent action of all the devisees. And where the testator's son was under the will given an option to take part of the real estate directed to be sold and to pay the sum therefor to the defendant legatees according to their respective shares, it was held that this option did not prevent a conversion: *Pyle's Appeal*, 102 Pa. St. 317, 321. So it has been ruled in Pennsylvania that the husband may elect to take as land a legacy to his wife of a share of proceeds of land directed to be sold, and may by such election vest the fee in himself or in her, the result depending upon his intention: *Hannah v. Swarner*, 3 Watts & S. 223; 38 Am. Dec. 754, and see note 758. But a remainderman, before an election to take a devise as land, has no interest in the land which will enable him to defeat the operation of the statute of limitations in favor of one in adverse possession under a conveyance from one of the trustees, and a subsequent election does not affect the purchaser: *Smilee v. Biffle*, 2 Pa. St. 52; 44 Am. Dec. 156. Upon this point the case of *Craig v. Leslie*, 3 Wheat. 562, 578, 579, determines that equity will not compel a trustee to execute a trust against the *cestui que trust's* wishes, when he has the whole beneficial interest in the

money or the land, as the case may be; but he may have his election and take the money or the land, provided there has been no actual conversion of the same, and such election may be by acts or declarations clearly showing such determination to elect. But in case such *cestui que trust* should die before making such election, the character given such property by the will accompanies it into the hands of those legally entitled thereto, and the property will go to his heirs or personal representatives precisely the same as if the trust had been executed, and such actual conversion made in his lifetime.

DELEGATION OF POWER TO SELL. — It is held in *Pearson v. Jamison*, 1 McLean, 197, that the power to sell may not be delegated, where the direction to the executor is to sell "in such mode as in his judgment shall be best for the interest of the estate."

WHAT LAW GOVERNS VALIDITY AND CONSTRUCTION OF WILL is the subject of the note to *Montgomery v. Milliken*, 43 Am. Dec. 518-520; and see *Burlington University v. Barrett*, 92 Id. 376, and note, where other cases are cited.

RULE AGAINST PERPETUITIES is fully discussed in the note to *Barnum v. Barnum*, 90 Am. Dec. 101-106. A devise to certain named persons "and their heirs and assigns forever, and the survivor of them, and his heirs and assigns forever," to manage, sell, and invest for the aid and support of testator's children and their descendants who may be destitute, etc., was held invalid as creating a perpetuity: *Kent v. Dunham*, 56 Am. Rep. 667.

BURCHARD v. ROBERTS.

[70 WISCONSIN, 111.]

EJECTMENT MAY, BY THE STATUTE OF WISCONSIN, BE BROUGHT AGAINST THE CLAIMANT of the title, if there is no actual occupant of the premises sought to be recovered.

MORTGAGEE CANNOT ACQUIRE TAX TITLE, and thereby cut off the mortgagor's equity of redemption.

PURCHASE OF LAND AT A TAX SALE by a party for the benefit of the mortgagee operates as a payment of the tax and a redemption of the land therefrom, both as to the mortgagor of the land against whom the taxes were assessed while in possession, but who was not the real owner, also as to the actual owners in fee; and a deed based on such sale is therefore invalid, and no title paramount to that of the true owner can be thereby acquired.

ACTION of ejectment. The plaintiff's ancestor, Austin C. Burchard, was granted a patent to the land in question by the state of Wisconsin on July 11, 1855, and plaintiff became vested with the fee thereof by descent on September 10, 1863, the date of the decease of said ancestor, and also by purchase from the widow of her interest before the commencement of this action, which was August 22, 1883. The defendant claimed to hold through one Charles Burchard, father of the said Austin C., and his chain of title was as follows: Deed

from said Charles to Charles Nes, dated November 9, 1866; deed from said Nes to Maggie Doty, dated June 25, 1867; mortgages in 1875 by the said Maggie, and Giles Doty, her husband, to Mary Cottrill, since deceased, and Virginia Thompson; conveyance June 28, 1879, by said Maggie and Giles Doty to Vincent Roberts; this conveyance included other land. Said Roberts was the agent of the holders of the above mortgages, and took said conveyance in trust for them, and also for the holders of certain mortgages on the other land, to insure the payment of the mortgage debts, and also in trust for Giles Doty, for whatever should remain of the property after said debts were paid. Roberts at the same time executed a contract or deed of defeasance to Doty, conditioned that upon the payment of the amount of said debts with interest, the land described in the trust deed should be then reconveyed. There was a further condition therein that the taxes should be paid by Doty, and that he should hold by sufferance as Roberts's tenant. About 1882, Roberts conveyed by quitclaim deed the lands so held by him under said trust deed to Horton Cottrill, who was administrator on the estate of Mary Cottrill, by whom was held the mortgage deed given her by the Dotys. Giles Doty was the actual purchaser from Charles Burchard, and the Dotys entered into possession in 1866, and continued in said possession till the spring of 1881. In 1879, the land was properly assessed to Giles Doty, and upon the non-payment of the taxes assessed for that year was thereafter, in May, 1880, duly sold. Vincent Roberts purchased the same at said sale for the amount due for taxes and legal charges, and thereupon received certificates of such sale, which said purchase and certificates were for the sole benefit of the beneficiaries under the deed of trust, including the Cottrill estate. Upon the termination of the occupancy by the Dotys of said land in 1881, one Bowker entered into the possession and occupancy thereof under Vincent Roberts, as his tenant, and received from him an assignment of said certificates of tax sale, and on June 22, 1883, a tax deed was executed to Bowker, which he held for Vincent's use and benefit and those for whom the latter was acting. In a few days thereafter, the said Bowker executed to John Roberts, son of Vincent, a deed of the land included in said tax deed. No interest was at any time claimed by said Bowker in or to said land other than as above stated, nor was anything paid by him for said certificates; no consideration was given for the deed to

John Roberts. At the time of the commencement of this action an action was pending in the United States circuit court wherein the recovery of the land here in controversy was sought. This action had been removed from the circuit court of Waupaca County, where it was brought in December, 1882. The original defendants to that action were Vincent Roberts and Giles Doty, but subsequently, by order of court, Horton Cottrill was added as defendant. In addition to the above facts, upon trial to the court, it was found that the fee to the land in controversy was in the plaintiffs; that the conveyance to the defendant was based upon no consideration, and was taken by him with the intent to defeat plaintiffs' title in the pending action in the federal court; that after such conveyance, the defendant secretly had "the apparent and nominal possession of the land" for the Cottrills since the rents and profits therefrom had been received by them; that Bowker was in possession under them during his entire occupancy, and that "the Cottrills" meant Mary Cottrill's heirs, represented by the administrator. The court found, as a matter of law, that the purchase of said lands under said tax sale in 1880 was a payment of the tax, and the tax deed was void; that the plaintiffs were owners in fee-simple at the commencement of the action, and were and are entitled to possession of the land; that defendant had asserted such claim to the lands at the commencement of the action as entitled the plaintiffs to maintain the same, and that the possession had at such time been unlawfully withheld from them by defendant. Judgment was accordingly entered for the plaintiffs to recover the land in controversy, together with costs, from which judgment the defendants appealed.

M. B. Patchin and E. P. Smith, for the appellants.

Moses Hooper, for the respondents.

LYON, J. This appeal presents two questions for determination. These are,—1. Was the action properly brought against John Roberts alone? 2. Was the purchase of the land in controversy by Vincent Roberts at the tax sale of 1880, and the payment therefor of the amount of the taxes and charges due thereon, a payment of the taxes and a redemption of the land therefrom?

1. The statute relating to parties in actions of ejectment contains the following provisions: "If the premises for which

the action is brought are actually occupied by any person, such actual occupant shall be named defendant in the complaint; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the action. The plaintiff may join as defendant any person claiming title to such premises, with any actual occupant thereof, or of some part or parcel thereof, holding as tenant under such person so claiming title or otherwise": R. S., secs. 3075, 3076. Under these provisions, if Bowker, the grantor of the defendant, was in the actual possession of the land claimed in August, 1883, when this action was commenced, he should have been made a party defendant to the action. In such case the present defendant, John Roberts, under whom Bowker was in possession, if at all, is also a proper party defendant, although not in the actual possession of the land.

The circuit court found that Bowker was in the actual possession of the land until he took the tax deed thereof. This was June 22, 1883. Perhaps the court might also have properly found that he retained possession thereof until he conveyed to the defendant, a few days later. But we find no satisfactory proof that Bowker was in possession when this action was commenced in August following. When asked directly whether he had remained in possession of the land ever since he deeded to the defendant, he answered evasively, as follows: "Since then he has told me that John Roberts owned the land; that I was to settle with him for this land; the rent of the land I have not paid for this last year; in fact I have not paid the interest on all the lands I own." Indeed all the testimony on the subject of Bowker's occupancy of the land after the conveyance to the defendant is very general, vague, and unsatisfactory.

It is quite obvious from the testimony that neither the Dotys nor Bowker ever resided upon the land, but only used it for farming purposes. We are left entirely in the dark as to the extent of that use, or, so far as Bowker is concerned, its continuity. A finding that Bowker ceased to occupy the land when he conveyed it to the defendant, and that it was unoccupied when the action was brought, could not properly be disturbed. This is probably the meaning and significance of the finding that the defendant after such conveyance had "the apparent and nominal possession" of the land. In such case

the action was properly brought against the defendant alone, for the taking of the tax deed was a claim of title to the land, which is sufficient under the statute (if the land be unoccupied) to support ejectment against the claimant. We reach this conclusion the more readily because we are satisfied, as the learned circuit judge evidently was, that the title and possession of the land were being manipulated by the two Roberts, father and son, for the purpose of embarrassing and defeating the plaintiffs in their pending action in the federal court, and that Bowker was a pliant tool in their hands to aid in accomplishing such purpose. This was an unjustifiable interference with the course of justice by Bowker and the defendant, who were not parties to that action, and because they were acting in unison it would be strict justice to hold, in analogy to the law which makes a conspirator liable for the acts of his co-conspirators in furtherance of the object of the conspiracy, that the act of one, or the possession of one, intended by both to affect the plaintiffs unfavorably in their other suit, is the act or possession of the other as well.

We conclude that the action is well brought against the defendant alone. It is not determined whether, conceding that Bowker should have been made a party, the defendant can, on the final hearing, and without having demurred for defect of parties, take advantage of such defect. Doubtless he might have applied to the court at the proper time for an order compelling the plaintiffs to bring in Bowker (if he was in possession) as a party defendant to the action, but he failed to do so.

2. In considering the second question above suggested, as to whether the purchase of the land at the tax sale by Vincent Roberts, and the payment therefor of the amount of taxes and charges against it, operate as a payment of the taxes, Cottrill and the other beneficiaries in the trust deed for whose benefit the purchase was made will be regarded as the purchasers. Obviously, such was the legal effect of the transaction. Such beneficiaries stood in the relation of mortgagees of the land. The execution of the trust deed may have had the effect of vesting the legal title to the land in their agent, Vincent Roberts; but such deed, and the defeasance executed by such agent to Doty, operated to preserve the mortgage relation between them, changing the securities, perhaps, to equitable mortgages. Such change, however, does not seem material to the question under consideration.

The taxes of 1879 were assessed against Doty, who was

then in possession of the land, claiming title thereto. Under the statute (R. S., sec. 1043), the tax was properly assessed against him, and he was legally chargeable therewith. Had he purchased at the tax sale, there can be no doubt the transaction would have operated as a payment of the tax, although tax certificates may have been issued to him: *Smith v. Lewis*, 20 Wis. 350; *Bassett v. Welch*, 22 Id. 175; *Jones v. Davis*, 24 Id. 229.

The question is, whether the mortgagees of the land are in any better condition than Doty, the mortgagor, to acquire title thereto by purchasing at the tax sale and taking certificates of sale. We have been referred to no case decided by this court, and are not aware that there is any such case, in which it is held that a mortgagee may, in this state, cut off the mortgagor's equity of redemption by acquiring title to the mortgaged land under a tax deed. True, several cases determined by this court are cited by the learned counsel for defendant as holding that a mortgagee may thus acquire adverse title, but an examination of those cases will show that none of them so hold. They will be noticed briefly in their order.

In *Wright v. Sperry*, 21 Wis. 331, 25 Id. 617, the plaintiff was grantee of the purchaser at a foreclosure sale on a mortgage executed by Sperry, the defendant, on the whole eighty acres of land. Sperry owned only an undivided interest in the land. After such sale, he acquired the remaining undivided interest. In the mean time Wright obtained the interest conveyed by a tax deed of the whole eighty acres issued on a tax sale for non-payment of the taxes assessed upon the land before such foreclosure sale. Wright was not therefore a mortgagee of the land, but was claimed to be a tenant in common with Sperry, and the validity of his tax deed was contested on that ground. The tax deed was held valid, and hence under it Wright was entitled to recover such after-acquired interest of Sperry in the eighty acres in controversy.

Sturdevant v. Mather, 20 Wis. 576, was an action to redeem from an equitable mortgage. The mortgagee had acquired the interest conveyed by two tax deeds of the mortgaged premises. Such deeds were held invalid for defective execution. The defendant, Mather, was the grantee of the mortgagee, and after taking such conveyance, he also acquired several tax deeds of the same premises. It was held that, under the instrument giving the lien, the mortgagee had no estate in the premises which he could convey to Mather, and

hence the latter was a stranger to the original title, and might assert title under his tax deeds to defeat the action.

Lybrand v. Haney, 31 Wis. 230, presented no question as between mortgagor and mortgagee. Neither did *Link v. Doerfer*, 42 Id. 391; 24 Am. Rep. 417. The first of these cases decides that one in possession of land under a valid tax deed may maintain an action based upon other tax deeds to him issued on sales for the non-payment of taxes on the same land, which he was under no obligation to pay, to foreclose the title and right of the original owner in and to such lands. In *Link v. Doerfer*, *supra*, it was held that a mere intruder in possession of land without color or claim of title is capable of acquiring adverse title by tax deed or other conveyance to himself.

It is plain that none of the above cases sustain the proposition to which they are cited. On the contrary, we are satisfied, on principle and authority, and especially in view of the statute which will presently be cited, that in the present case the purchase of the land at the tax sale for the mortgagees, and the taking of tax certificates thereon, must be regarded as for the protection of the estate and the mutual benefit of the mortgagees and mortgagor. As was said by Dixon, C. J., in *Fisk v. Brunette*, 30 Wis. 102, such purchase and the taking of the certificates must be regarded as so much money advanced to the mortgagor on the faith of the security.

The above reference is to Revised Statutes, sections 1158-1160. These sections, in effect, add the amount so paid for taxes by the mortgagee to the mortgage debt, and extend the security of the mortgage over it. These statutory provisions give the mortgagee an adequate remedy to reimburse himself for the taxes thus paid by him, and are inconsistent with the idea that he may cut off the mortgagor's equity of redemption in the mortgaged premises by acquiring an adverse title thereto under tax proceedings.

Moreover, without regard to statutory provisions, there is high authority for thus holding on general principles of law. Judge Cooley, in his treatise on the law of taxation, says: "It cannot be said in such a case that either mortgagee or mortgagor is under no obligation to the government to pay the tax. On the contrary, the tax being one that purposely is made to override the lien of the one as well as the title of the other, it might well, as it seems to us, be held that neither mortgagor nor mortgagee was at liberty to neglect the payment as one

step in bettering his condition at the expense of the other, but that the presumption of law should be that the party purchasing did so for the protection of his own interest merely. And so in general are the authorities": Pages 503, 504, and cases cited in notes. This language of Judge Cooley is quoted approvingly in Mr. Freeman's learned note to *Blake v. Howe*, 15 Am. Dec. 684. This doctrine commends itself to our judgments as reasonable and just.

It must be held, therefore, that as to Doty the purchase of the land at the tax sale by Vincent Roberts, for the benefit of the mortgagees, operated as a payment of the tax and a redemption of the land therefrom.

It remains to be determined how the plaintiffs are affected by the transaction. Had the mortgagees, instead of purchasing the land at the sale and taking tax certificates, paid the taxes and taken a receipt therefor, there can be no doubt that such payment would have inured to the benefit of these plaintiffs, and no question of a tax lien on the land or tax title on account of such taxes could be raised against them. Holding, as we do, that the transaction above mentioned operated as a payment of the taxes, no good reason is perceived why the same result should not follow, although, instead of paying and taking a receipt therefor, they bid off the land for the amount of the taxes, paid the same, and took certificates of sale. We are quite unable to see how these transactions can operate as a payment as to Doty, while as to the other plaintiffs it is the acquiring of a title paramount to theirs.

There are, doubtless, cases elsewhere which hold the opposite doctrine. Whether these cases are based upon statutes differing from ours, or made in the absence of any statute on the subject, we shall not stop to determine. Our duty is to construe our own statute, and thus settle the law in that behalf in this state.

It will be observed that the statute above cited (secs. 1158-1160) refers only to taxes. No mention is made of any other description of encumbrance which the original lien-holder may pay, and extend his lien to cover such payment. Hence, if a mortgagee or other lien-holder should, for the protection of his lien, purchase a paramount outstanding mortgage or judgment, it is not here decided whether he may or may not acquire an adverse title thereunder which will cut off the mortgagor's equity of redemption in the mortgaged premises.

It follows that the tax deed to the defendant is void. That

deed eliminated from the case, there can be no doubt of the plaintiffs' right to recover. Certain acts of Charles Burchard, who sold the land in controversy to Doty, were proved, tending to show an interference by him with the land, and that he claimed to own it, but nothing appears which can operate to divest the plaintiffs of their legal title thereto.

By the COURT. The judgment of the circuit court is affirmed.

MORTGAGEE CANNOT ACQUIRE TAX TITLE AND SET IT UP AGAINST HIS MORTGAGOR: *Mills v. Tukey*, 83 Am. Dec. 74; *Blake v. Howe*, 15 Id. 684, and note; *Allison v. Armstrong*, 41 Am. Rep. 281.

ADDING TO OR STRENGTHENING TITLE UNDER SALE FOR TAXES: *Moss v. Shear*, 85 Am. Dec. 94, and note 99.

MORTGAGEE MAY PAY TAXES AND ADD AMOUNT TO MORTGAGE DEBT: *Sidenberg v. Ely*, 43 Am. Rep. 163.

PAIGE v. PETERS.

[70 WISCONSIN, 173.]

LIEN UPON LAND ENTERED AS A HOMESTEAD, BUT FOR WHICH THE PATENT HAS NOT BEEN ISSUED, cannot, under section 2296 of the Revised Statutes of the United States, be acquired, for machinery placed thereon, to secure payment therefor. But where the removal of such machinery will not materially impair the realty, a lien may be claimed on the machinery itself under the Wisconsin statute.

ACTION to enforce a lien for machinery and materials purchased by the defendant, Theodore H. Peters, and used in and upon a certain steam saw-mill upon the lands in question.

J. H. Trever and Silverthorn, Hurley Ryan, and Jones, for the appellants.

Bardeen, Mylrea, and Marchetti, and H. H. Grace, for the respondent.

CASSODAY, J. 1. Peters entered the land as a homestead claimant under the laws of the United States, October 7, 1878: U. S. R. S., secs. 2289, 2290. April 7, 1884, he made and filed in the land-office his final and requisite proofs, and thereby became entitled to a patent: Id. It is conceded that no patent was issued thereon until after the trial of this action. The plaintiff's debt against Peters was contracted, and the machinery purchased thereby used in and upon the saw-

mill upon the land in question, some two months prior to the making and filing of such final proofs. He claims a lien therefor, and in fact filed such claim as required by the statutes of the state, July 11, 1884: R. S., secs. 3314, 3318, 3320. The action was commenced and notice of *lis pendens* filed within the time and manner required by the statutes to preserve the lien, if not otherwise barred: Id., secs. 3318, 3321, 3322. It is claimed by the plaintiff that, notwithstanding no patent had ever been issued to Peters, yet he had an equitable interest in the land, to which such alleged lien attached, and against which it can be enforced. The statutes of the United States, under which such homestead entry was made, declare that "no lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor": U. S. R. S., sec. 2296. Did this section bar the claim of the plaintiff for a lien upon the land? Upon such a question the decisions of the supreme court of the United States are of course binding upon the state courts. In speaking of a somewhat similar statute, it was said in *Wilcox v. McConnell*, 13 Pet. 516, 517, that "Congress has declared, as we have said, by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent has issued; and therefore, by the laws of the United States, the legal title has not passed, but remains in the United States. . . . We hold the true principle to be this: that whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States": See *Irvine v. Marshall*, 20 How. 564; *Gibson v. Chouteau*, 13 Wall. 92. To the same effect is *Seymour v. Sanders*, 3 Dill. 440, 441. In *Fink v. O'Neil*, 106 U. S. 283, Mr. Justice Matthews, *arguendo*, speaking for the court, said the above section, "providing for the acquisition of homesteads for actual settlers upon the public lands, has made their exemption from sale on execution a permanent part of the national policy, by declaring that lands so acquired shall not 'in any event become liable to the satisfaction of any debt contracted prior to

the issuing of the patent therefor.'” This is in harmony with the decision of this court in *Gile v. Hallock*, 33 Wis. 523. See *Russell v. Lowth*, 21 Minn. 167; 18 Am. Rep. 389; *Miller v. Little*, 47 Cal. 348. As to those classes of cases holding that the interest of such occupant of such land is taxable, *Wisconsin Cent. R. R. Co. v. Price Co.*, 64 Wis. 594; or may be mortgaged or conveyed, *Fuller v. Hunt*, 48 Iowa, 163, *Nycum v. McAllister*, 33 Id. 374, *Kirkaldie v. Larrabee*, 31 Cal. 455, 89 Am. Dec. 205,—it is unnecessary here to speak, since they do not come within the prohibition of the federal statute cited. We must hold that the plaintiff acquired no lien upon any estate in the land, either legal or equitable.

2. Whether he lost his lien upon the machinery sold to Peters, and by him put in the mill, is a different question. Our statutes provide in effect that in case the person so ordering or contracting “for the purchase of any machinery to be placed in, or connected to, or with, any building or premises,” has no interest in such building or premises, “sufficient for a lien as provided” therein, “to secure payment for said machinery, the person furnishing such machinery shall have and retain a lien upon such machinery, and shall have the right to remove from such building or premises such machinery in case there shall be default in the payment for such machinery when due, leaving such building or premises in as good condition as they were before such machinery was placed in or on the same”: R. S., sec. 3314. Under this statute, Peters contracted for and received the machinery in question subject to such lien. The plaintiff has neither said nor done anything indicating an intention or willingness to relinquish such lien. On the contrary, he took all the statutory steps to preserve and continue the same. Has he lost it by the mere act of the defendant in placing it upon land which he occupied, but to which the title was in the United States? Peters necessarily knew the condition and nature of his title. Whether the plaintiff did, does not appear. The federal statute quoted was merely to preserve the land from the liability therein mentioned. It was no purpose of that statute to render state laws giving a lien upon personal property nugatory, merely because such property happened to be placed upon such land. Our statutes give such lien upon such machinery purchased under the circumstances indicated as personal estate, to be enforced as prescribed: *Wilson v. Rudd*, 70 Wis. 98. We have not overlooked the Kansas case cited: *Kansas Lumber Co. v. Jones*, 32

Kan. 195. That case may be distinguished, since there is nothing here indicating any permanent attachment of the machinery to the soil, or that a removal of the same will materially impair the realty. We must, under our statutes, and upon the facts stated, hold that the plaintiff has a lien upon the machinery in question, as upon personal property, to be enforced in this action.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded, with direction to enter judgment in favor of the plaintiff and against the defendant, as indicated in this opinion.

LIABILITIES AGAINST WHICH THE HOMESTEAD EXEMPTION MAY BE ASSERTED: See, in general, Freeman on Executions, 2d ed., sec. 249.

LANDS ACQUIRED UNDER FEDERAL HOMESTEAD ACT are not liable to satisfaction of any debt contracted prior to the issuance of the patent: *Russell v. Lowth*, 18 Am. Rep. 389.

RETROACTIVE CONSTRUCTION OF HOMESTEAD EXEMPTION LAWS: Note to *Rockwell v. Hubbell's Adm'rs*, 45 Am. Dec. 252.

JOHANNES v. STANDARD FIRE OFFICE (LIMITED) OF LONDON.

[70 WISCONSIN, 196.]

FIRE INSURANCE. — ASSURED HAS AN "ENTIRE UNCONDITIONAL AND SOLE OWNERSHIP" within the conditions in a policy, although the possession of the realty, on which the building and insured property are situate, is held by him under an agreement for its purchase, and the balance due thereon is unpaid at the time the policy is issued, said policy being held by the agent until the land is paid for and the deed given the plaintiff, after which the loss occurs.

ACTION upon fire insurance policy issued by defendant, the Standard Fire Office. Judgment was given for the plaintiff, from which the defendants appealed.

Levi M. Vilas, for the appellants.

George C. Teall and Fred. A. Teall, for the respondents.

COLE, C. J. The defense is based upon alleged breaches of the conditions in the policy, which, it is claimed, exonerate the defendants from all liability for the loss. The policy provided it should be void if there was "any omission to make known every fact material to the risk," and "if the interest of the assured in the property be other than the entire, uncondi-

tional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of the policy; otherwise the policy to be void." It is said the facts proven on the trial show a breach of these conditions. There is really no disagreement about the material facts of the case.

It appears that the plaintiff applied to the local agent of the Standard Company for insurance about the 1st of July, 1883. At this time he had possession of the realty on which the building and insured property were situated, under a land contract upon which he had paid one hundred dollars; two hundred dollars, the balance of the purchase price, became due and was paid after the policy was issued. The improvements on the land were of greater value than the insurance. The policy was issued and remained in the hands of the agent until the land was paid for and a warranty deed obtained, which was in August, 1883. The plaintiff received the policy from the agent in October following. There was no written application made for insurance, and no representation made or question asked as to plaintiff's title or interest in the land or building; nothing was said upon that subject. The agent testified that he did not know what the plaintiff's title was in the land, or that he held it under a contract of purchase. The plaintiff, however, testified that when he made application for insurance he showed the agent the contract, who took it to obtain a description of the land on which the insured building was situated; and, in answer to a question submitted, the jury found that such was the fact. It is plain, therefore, that the agent had the means of information as to plaintiff's interest in the realty before him, and it is almost incredible that he did not know what his title was. Under the circumstances, the plaintiff cannot be justly charged with an omission to make known the fact that he held the land under a contract for the purchase thereof.

We do not dwell upon these facts, nor express any opinion as to how they would affect the liability of the company, providing it was made to appear that the plaintiff was not the sole and unconditional owner of the entire interest in the property, within the meaning of the condition relied on. But if the plaintiff is held to the exact language of the condition, which it is perfectly clear he never saw until long after the policy was issued, still the evidence shows that his interest in

the property was an entire, unconditional, and sole ownership. He was the real owner of the property in equity, and for all purposes of insurance. The condition does not relate to a legal title in fee-simple, nor is that the interest described. An equitable title, if sole and unconditional, answers the description fully; and if the property was destroyed, the entire loss would fall upon the plaintiff. There is no ground, therefore, for saying there was a misdescription of the nature of the plaintiff's interest in the property. If the company deemed it material that the state of the legal title should be described, it doubtless would have framed the language to call for that information. But it did not. The interest of the plaintiff satisfies the condition as we construe it, as he was in possession, and was the sole equitable owner. In the absence of any specific inquiry by the insurers, or express stipulation in the policy, no particular description of the nature of the insurable interest is necessary: *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40; 20 Am. Dec. 507; *King v. State Mut. F. Ins. Co.*, 7 Cush. 13; 54 Am. Dec. 683; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389; 3 Am. Rep. 711. But the question before us seems to be settled by the adjudications. In *Hough v. City F. Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581, an applicant for insurance had described the property in a written application as "his house," and it was so described in the policy. The policy contained the condition: "If the interest in the property to be insured is not absolute, it must be so represented to the company, and expressed in the policy in writing; otherwise the insurance shall be void." The legal title to the property was in another party, with whom the insured had, at the time of the application, made a parol contract for its purchase, for a price agreed upon, which the insured had agreed absolutely to pay, and a part of which he had paid, and the insured had entered into possession as purchaser and had made valuable improvements on the property. Upon the claim of the insurance company, in a suit on the policy, that the insurance was void by reason of the omission of the insured to state in his application the condition of the title, the court charged the jury that the plaintiff was to be regarded as the owner of the property, if he had the equitable title, and his interest was such that the loss would fall on him if the property was destroyed. This charge was held to be correct, and that an absolute interest which is so completely vested in the party owning it that he could not be deprived of it

without his consent would satisfy the condition. In *Dolliver v. St. J. F. & M. Ins. Co.*, 128 Mass. 315, 35 Am. Rep. 378, a policy of insurance contained the same condition precisely as the one before us. The insured, at the time the policy was issued, was the owner in fee of the property insured, but had mortgaged it, and also leased it for a term of years. The policy contained no statement of these encumbrances; still it was held that the policy was not thereby avoided. The court say: "The provision is in the body of the policy, and is inserted for the benefit of the insurer. It is to be construed strictly against it, and liberally in behalf of the assured. If, therefore, its terms can be satisfied by a construction which will save the policy and at the same time accord with the established rules of law, such construction must be adopted." There are numerous cases which hold that one who has an equitable interest in property may be described as the owner thereof: *Ætna F. Ins. Co. v. Tyler*, 16 Wend. 385; 30 Am. Dec. 90; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568; 29 Am. Rep. 271; *Pelton v. Westchester F. Ins. Co.*, 77 N. Y. 605; *Manhattan F. Ins. Co. v. Weill*, 28 Gratt. 389; 26 Am. Rep. 364; *Acer v. Merchants' Ins. Co.*, 57 Barb. 68; *Farmers' M. F. Ins. Co. v. Fogelman*, 35 Mich. 482; *Dohn v. Farmers' J. S. Ins. Co.*, 5 Lans. 275; *Millville F. M. Ins. Co. v. Wilgus*, 88 Pa. St. 107; *Martin v. State Ins. Co.*, 44 N. J. L. 486; 43 Am. Rep. 397; *Insurance Co. v. Haven*, 95 U. S. 242.

In this case, the plaintiff, by the contract and its part performance, had acquired an absolute vested interest in the property, which he could encumber, sell, and which would descend to his heirs. He was not in default in making payments, and was to all intents and purposes the sole owner. The condition in question speaks only of the nature of the interest insured, not of its extent or legal character. The plaintiff's interest fully answered the description in the condition. In *Hinman v. Hartford F. Ins. Co.*, 36 Wis. 159, the assured made a written application in which he falsely represented his interest in the property. He was in default in his payments, and this court held that a representation that he was the sole and undisputed owner of the insured property was in the nature of a warranty, and being untrue, avoided the policy. The case is distinguishable from the one at bar.

The learned counsel for the defendants called our attention to cases which decide that one who has merely an estate for life in premises cannot be regarded as the sole and absolute

owner, within the meaning of a condition such as we are considering: *Davis v. Iowa S. Ins. Co.*, 67 Iowa, 494; *Garver v. Hawkeye Ins. Co.*, 69 Id. 202; or one who has but a lien for a debt, as in *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47; 20 Am. Rep. 451; or a purchaser at an execution sale: *Reaper City Ins. Co. v. Brennan*, 58 Ill. 158; 11 Am. Rep. 54; or a mortgagee in possession: *Southwick v. Atlantic F. & M. Ins. Co.*, 133 Mass. 457; *Waller v. Northern Ass'n Co.*, 10 Fed. Rep. 232; or one who has only a leasehold interest: *Mers v. Franklin Ins. Co.*, 68 Mo. 127. But these cases, it is obvious, are not in point here, where the insured was in no default in making payments, and was the equitable owner, having the right to enforce a specific performance of the contract and obtain the legal title outstanding in his vendor.

It follows from these views that there was no breach of the condition in question shown, and that the judgment must be affirmed.

By the COURT. Judgment affirmed.

INSURANCE BY ONE HOLDING UNDER CONTRACT OF PURCHASE: *Lorillard Fire Ins. Co. v. McCulloch*, 8 Am. Rep. 52; *Imp. F. I. Co. v. Dunham*, 2 Am. St. Rep. 686.

OMISSION TO STATE NATURE AND EXTENT OF INTEREST DOES NOT AVOID POLICY where the conditions of policy do not exact it, and the company is not mutual: Note to *Mutual Ins. Co. v. Deale*, 79 Am. Dec. 680. So the interest of the assured may be sufficiently described by the words, "my dwelling-house": Note to *Strong v. Manufacturers' Ins. Co.*, 20 Id. 510; nor does one by describing the property insured as "my house," thereby warrant his title to the realty to be an unencumbered fee-simple: *Mutual Ins. Co. v. Deale*, 79 Id. 673; and a description of property as "his buildings" by the assured, where he did not own them but had only an interest therein and was in possession, is not a warranty of ownership: *Rohrbach v. Germania F. Ins. Co.*, 20 Am. Rep. 451. As to buildings on leased property, see *Fowle v. Springfield Ins. Co.*, 23 Id. 308.

AS TO WHAT CONSTITUTES INSURABLE INTEREST, see *Bartlet v. Walter*, 7 Am. Dec. 143, and note; also note to *Strong v. Manufacturers' Ins. Co.*, 20 Id. 510.

WHEREATT v. ELLIS.

[70 WISCONSIN, 207.]

DEFAULT INCURRED BY FOLLOWING IN GOOD FAITH THE ADVICE OF COUNSEL SHOULD BE RELIEVED AGAINST, where the judgment is for a large sum, and a meritorious defense exists. In such case it is the duty of the court, where the application is properly made alleging such defense, to open the judgment upon reasonable terms; a refusal to do this is a manifest abuse of discretion.

THIS action was brought in 1883. Three several causes of action were set forth in the complaint, the nature of which appear in 58 Wisconsin, 625. An answer was served by the defendants in 1884, wherein a defense upon the merits was set up to each cause of action; the answer also contained a counterclaim, to which the plaintiff replied, denying each allegation therein. On July 2, 1885, an order was made (65 Wis. 640, 641) that said answer be stricken out, and judgment rendered against the defendant, unless he should give a certain deposition as required, which, before that time, he had refused to do, and also unless certain other portions of said order should be complied with within twenty days after a copy of the same should be served, which latter was done on July 13, 1885. An appeal from that order was taken July 24, 1885, and April 6, 1886, it was affirmed: 65 Wis. 639. On June 8, 1886, a *remititur* was filed, and June 11, 1886, default was taken without notice to the defendant for \$2,938.10. Immediately thereafter, on June 12th, the defendant notified the plaintiff of his willingness to fully comply with the order of July 2, 1885, and fixed the time therefor as June 22, 1886. This offer was refused by the plaintiff. Upon application of the defendant, an order was made by the court on June 17, 1886, that the answer above mentioned should stand; that trial might be had of said cause conditioned upon the payment of costs and the giving of said deposition by the defendant as required; and that upon non-compliance with said condition that said judgment should operate as the final judgment in said cause. An appeal was taken by the defendant from said judgment on June 25, 1886, and also from the last-mentioned order, and these were affirmed (68 Wis. 61) on February 1, 1887. A *remittitur* thereon was filed March 3, 1887. Affidavits setting out the several facts necessary, together with the requisite records and papers, were filed by the defendant; whereupon, the plaintiff, on March 5, 1887, was ordered to show cause why the default obtained by reason of the defendant's non-com-

pliance with the order of June 17, 1886, should not be opened, said judgment be vacated, the defendant's answer be allowed to stand, and trial and hearing be had of said cause on the merits, upon the defendant's complying with the conditions relating to the giving said deposition, and upon reasonable terms as to costs. The defendant, in seeking such relief, alleged principally, besides other matters, a meritorious defense; that he had followed in good faith the advice of counsel in taking said appeals; that the order of June 17, 1886, imposed burdensome and illegal terms; that no notice was given of the entering of said judgment, which was done in vacation by the clerk, and that the amount thereof was largely in excess of that claimed in the complaint. From the affidavit of counsel, it appeared, among other things, that the plaintiff's attorney had been paid \$84.75 costs on the last appeal in this court. Said application to reopen said default was refused, and the motion overruled by order of the court made on March 24, 1887. The defendant appealed from this order.

Alexander Meggett and W. F. Bailey, for the appellant.

Levi M. Vilas, for the respondent.

CASSODAY, J. This is the sixth appeal to this court in this cause. No trial or hearing upon the merits has ever been had, notwithstanding an answer upon the merits to each of the several causes of action was served nearly three years ago. The wisdom of meeting all questions having merits upon the merits at the first opportunity is here both illustrated and demonstrated. But we are not prepared to say that these several appeals were the result of mere perversity. The first appeal from the order on the demurrer was before the answer, and not here involved. No such perversity can be fairly claimed as to the appeal from the order of July 2, 1885, as the question involved went to the jurisdiction of the commissioner and was decided by a divided court. No bad faith can be imputed by reason of the appeal from the judgment, as it raised questions which were fairly debatable. The only ground left for imputing bad faith is the appeal from the order of June 17, 1886, and the order of the judge at chambers made June 23, 1886; and which last appeal was dismissed: 68 Wis. 61. Those orders were made after the defendant's answer had been stricken out and judgment entered, without notice, as upon default. As indicated in the opinion last cited, the entry of

such judgment in that way was manifestly a surprise to the defendant. As there said, it "apparently grew out of a misconception or inadvertence in relation to the order of July 2, 1885, and the effect of the appeal from it." The defendant seemed to have acted on the theory that the stay of proceedings granted by a justice of this court, and then continued by the court, related back to the time of taking the appeal, and hence prevented any default of the defendant. But, as there shown, the time for paying the costs and giving the requisite notice expired July 27, 1886, and the stay was not granted until July 28, 1886, and then only operated from that day and pending the appeal. It is easy to perceive how an attorney might be misled under such circumstances. Among the conditions of the order of June 17, 1886, was the one that the judgment should stand as security for the payment of any judgment the plaintiff might recover. This being so, an appeal from the judgment in good faith would seem to indicate the necessity of appealing also from the order; whereas, not to appeal from either would have left the defendant in a position where, if beaten upon the merits, he would have been obliged to pay a judgment which, if we are to believe his affidavit, he conceived to be not only excessive, but unjust. Moreover, as the continuance of the judgment was among the conditions of the order, the mere giving of the deposition and payment of costs, after the appeal from the judgment, would not have been a full compliance with the order; besides, there had been an offer to give the deposition.

Upon the facts stated, can we say that the defendant has forfeited all right to any trial or hearing upon the merits? The application here refused was addressed to the sound discretion of the trial court: R. S., sec. 2832. In *Union National Bank v. Benjamin*, 61 Wis. 514, it was said that terms may "be imposed which, as near as may be, will place the plaintiff in as favorable a position as he would have been in had the relief been denied. But the order of the court places the plaintiff in a better position, for it gives it absolute security for any judgment it may recover in the action"; and hence it was held to be an abuse of discretion. In *Morgan v. Bishop*, 61 Id. 410, the order was reversed on the ground that there had been an abuse of discretion, because the defendant was allowed, after the cause had been at issue for some time and the plaintiff had subpoenaed his witnesses and was ready for trial, to amend his answer by pleading for the first time the

statute of limitations, without imposing any terms except the mere costs of the motion. It is there said: "What will be in the 'furtherance of justice,' and what 'terms' are to be regarded as 'just,' must depend upon the facts of each particular case." Then, after citing several cases illustrative of the rule, it is further said on page 411: "Such being the established rules of law, the obvious duty of a trial court, sitting as a court of conscience, in the exercise of a sound discretion upon such application, is to do or secure substantial justice to the parties under all the circumstances"; among which were there enumerated, "the state of the litigation, the amount of costs that have been incurred, whether the allowance of such amendment would work a continuance, and any other fact going to the equity of such allowance."

Here, the answer stricken out, and sought to be made available as a defense, did not set up the statute of limitations, nor usury, nor any unconscionable defense, but defenses which, if true, were each and all meritorious and such as to entirely defeat each of the causes of action alleged in the complaint, to say nothing of the counterclaim. The defendant may never be able to prove the defenses alleged, but for the purposes of this application they must each be taken as true. So taken, and the case presented is a judgment of about three thousand dollars against the defendant as upon a default, when he had a good defense upon the merits to each and all the several causes of action alleged in the complaint, but which he had been precluded from proving in the manner indicated, and which he never can make available. In other words, upon the case thus stated, the defendant is held liable for the payment of three thousand dollars, without any meritorious cause of action against him, as the price of his temerity in appealing from an order of the trial court under the advice of counsel, instead of submitting thereto, as we have held he should have done. Defaults incurred through the ill advice or negligence of counsel are to be relieved against as well as any others: *Morgan v. Bishop, supra*; *Hanson v. Michelson*, 19 Wis. 498. Of course, as urged, the trial court has a discretion in such matters, but "such discretion must be a legal discretion, and where the application is made in time, and presents a case of 'mistake, inadvertence, surprise, or excusable neglect,' accompanied by a verified answer alleging a good defense on the merits, it is a manifest abuse of discretion not to open the judgment upon reasonable terms": *Cleveland v. Hopkins*, 55 Id. 390.

The duty of the trial court, sitting as a court of conscience, in such matters, is, as above indicated, "to do or secure substantial justice" between the parties, under all the circumstances. To do that, where a defendant is in default, having a good and conscionable defense, thus excused and presented, is to give him a trial or hearing upon the merits, upon such terms and conditions as to do no injustice to the opposite party. The trial court acted upon that theory in making the order of June 17, 1886. That order should have been complied with. The failure to comply with it operated as a delay from June to the March following. A new order, the same in substance, with new dates for the time of the payment and the examination therein mentioned, and in addition requiring the defendant to pay to the plaintiff or his attorney such sum as may be fixed by the trial court, not exceeding fifty dollars, should now be entered.

By the COURT. The order of the circuit court is reversed, and the cause is remanded, with direction to enter an order in substance and effect as indicated.

NEGLECT OF COUNSEL NOT GROUND OF RELIEF FROM DEFAULT, UNLESS SHOWN TO BE EXCUSABLE: *Spaulding v. Thompson*, 74 Am. Dec. 221, and note 222.

DISCRETION POSSESSED BY COURTS IN SETTING ASIDE DEFAULT IS SOUND LEGAL DISCRETION: *Browning v. Roane*, 50 Am. Dec. 218; and not a capricious or arbitrary discretion: Note to *Burnham v. Hays*, 58 Id. 393; see also *Freeman on Judgments*, sec. 541.

SEEFELD v. CHICAGO, MILWAUKEE, AND ST. PAUL RAILROAD COMPANY.

[70 WISCONSIN, 216.]

RAILROAD—NEGLIGENCE. — IF THE VIEW OF A TRAVELER ON THE HIGHWAY APPROACHING A RAILROAD CROSSING is so obstructed that he cannot see an approaching train in time to stop his team before colliding with it, if he knows that a train is due at such crossing, at or about such time, and if he is unable to hear the approaching train when his team is in motion, whether by reason of the force and direction of the wind or of noises in the vicinity, whether made by his own wagon or by other causes, ordinary care requires him to stop his team while he may do so, and listen for the train.

QUESTION OF CONTRIBUTORY NEGLIGENCE — WHETHER FOR JURY OR COURT. — If the testimony relating to such negligence is conflicting, or not being conflicting if the inferences to be drawn therefrom are doubtful or un-

certain, the question of negligence is for the jury. But if the evidence is undisputed, and the inferences therefrom plain and certain, the question is one of law for the court.

ACTION to recover damages for injuries sustained by the plaintiff in his person and property, claimed to have been caused by the negligence of defendant in running one of its trains over the Wisconsin Valley division of its road at a point where the road crossed a highway known as Bridge Street, in the city of Wausau. Said highway extended east and west, and the railroad crossing it extended north and south. At the point of intersection there was, in addition to the main track, a spur track which also crossed said street about thirty-two feet east of the main track. Bridge Street was also crossed by First Street about 227 feet east of the main track. Bridge Street was planked from a point within forty-five feet west of First Street to a point west of said main track, which planking was sixteen to eighteen feet in width. Just east of the spur track, and on the north side of Bridge Street, was a planing-mill, the platform of which extended west to the spur track, and upon this platform lumber was piled. In front of the platform, and probably as far south as Bridge Street, box-cars were standing upon the spur track, a passage-way was left for teams to pass over the plank-road between these cars and another car south of them, also standing on the same track. Owing to these facts, a train approaching from the north, — as in this case, — could not be seen by a person on Bridge Street between the spur track and a point a few feet west of First Street. There was a gradual descent on Bridge Street from First Street to the spur track, and from there to beyond the main track the descent was much sharper, the spur track being three or four feet higher than the main track, so that a heavily loaded team could be easily stopped before reaching the spur track, but between that and the main track this would be difficult to do. The plaintiff with his daughter was driving east on that part of Bridge Street above described, with a team hitched to a wagon loaded with merchandise; directly ahead of him was a team loaded with long wooden frames piled very high crosswise upon the wagon, and behind him was another team. All three teams were being driven in the same direction. The plaintiff was walking his team and looking and listening for approaching trains. The driver of the advance team saw the coming train after he had passed the spur track, but crossed the main track in safety. The plaintiff had

crossed the spur track when he also saw the train. Not being able to stop his team in time, he turned them to the south, but not quickly enough to avoid being struck as he was by either the locomotive or the tender. One horse was killed, the other injured, the wagon was overturned, the property therein destroyed, and the plaintiff himself was seriously injured. The train was running at about fifteen miles an hour when it passed the crossing. It did not appear other than as a disputed fact whether the whistle was blown or the bell rung as the train approached the crossing. The jury was directed by the court to give a verdict for the defendant on the ground that the plaintiff was guilty of contributory negligence. A motion for a new trial having been denied, judgment was entered in accordance with the verdict, from which judgment the plaintiff appealed.

Bardeen, Mylrea, and Marchetti, and G. W. Cate, for the appellants.

John W. Cary, Burton Hanson, and J. T. Fish, for the respondents.

LYON, J. In the consideration of the present case, it will be assumed that there was sufficient evidence to send the question of the negligence of the defendant company to the jury. The only question to be determined is, Does the uncontradicted evidence prove conclusively that the plaintiff was guilty of negligence which contributed directly to the injuries of which he complains? The circuit judge was of the opinion that, under the peculiar circumstances of this case, it was the duty of the plaintiff to have stopped his team while he could do so, that he might the better hear the approach of the train.

It is undisputed that, for almost 150 feet before he reached the spur track, and until he had passed that track, where it was too late to avoid a collision with the train, the plaintiff could not see a train on the main track approaching from the north. Driving as he was between two other teams, upon a plank-road, the leading wagon and his own being heavily loaded, the conclusion is irresistible that there must have been sufficient noise in his immediate vicinity seriously to interfere with his hearing the train as it approached the crossing. Besides, the wind blew from the south, which would be another obstacle to his hearing the train. He was well acquainted with the crossing, and is chargeable with knowledge of all the circumstances of danger which surrounded

him. Moreover, the important fact is undisputed that he knew and remembered that the train was due and should pass the crossing just about the time he reached it. The train was absolutely hidden from his view, and his vision was of no service whatever to him in detecting its presence. So far as seeing the train is concerned, he might as well have been blind. The only sense which could enable him to learn of the presence of the train was that of hearing, and because of the circumstances just mentioned, that was liable to be entirely insufficient for the purpose while his team was in motion. Had he stopped his team as he approached the spur track, which he might easily have done, it is highly probable that he would have heard the train. At any rate, a delay of a few seconds would have avoided the collision and the injury. In view of these conditions, considering that the crossing was a very dangerous one at best, and that the peril was imminent because the train was then due there, of which fact the plaintiff was conscious at the time, is it not reasonable to hold that it was his duty to employ his hearing to the best advantage to discover the approach of the train? And to listen effectually, was it not necessary that he should stop his team?

Many adjudications by this and other courts, claimed to be in point on these questions, were cited by the respective counsel in their very able arguments. While such adjudications are valuable in determining the general principles of law on the subject of negligence, yet inasmuch as no two cases are exactly parallel in their facts, they do not always, or often, furnish sufficient or safe guides for applying those principles correctly to the facts of any given case. Such application must necessarily be made in each case in the light of its own facts. Thus, for example, the rule of law is, that the negligence of the plaintiff, or his want of ordinary care, which contributed proximately to the injury of which he complains, defeats an action predicated upon a charge of negligence against the defendant. But whether the plaintiff was guilty of such negligence must be determined from the facts of the particular case. Again, if the testimony relating to such negligence is conflicting, or, not being conflicting, if the inferences to be drawn therefrom are doubtful or uncertain, the question of negligence is for the jury. But if the evidence is undisputed and the inferences therefrom plain and certain, the question is one of law for the court.

The cases cited on behalf of the defendant, to show that plaintiff should have stopped his team and listened for the expected train, seem to us to come nearer this case in their facts than those cited to sustain the opposite view. Those cases on behalf of the defendant, or some of them, are here cited, but will not be discussed: *Mantel v. Chicago etc. R. R. Co.*, 33 Minn. 62; *Haas v. G. R. etc. R. R. Co.*, 47 Mich. 401; *Griffin v. Chicago etc. R. R. Co.*, 68 Iowa, 638; *Schaefer v. Chicago etc. R. R. Co.*, 62 Id. 624; *Tucker v. Duncan*, 9 Fed. Rep. 867; *Connelly v. New York etc. R. R. Co.*, 88 N. Y. 346; *Wilds v. Hudson River R. R. Co.*, 24 Id. 430; *Merkle v. New York etc. R. R. Co.*, 49 N. J. L. 473; *Northern Pacific R. R. Co. v. Holmes*, 3 Wash. Ter. 202; *Kennedy v. Chicago etc. R'y Co.*, 68 Iowa, 559. See also the late case of *Jepson v. Chicago etc. R. R. Co.*, in United States circuit court of Minnesota (unreported).

The rule to be deduced from these cases is this: if the view of a traveler on the highway approaching a railroad crossing is so obstructed that he cannot see an approaching train in time to stop his team before colliding with it, if he knows that a train is due at such crossing at or about such time, and if he is unable to hear the approaching train when his team is in motion, whether by reason of the force and direction of the wind or of noises in the vicinity, whether made by his own wagon or by other causes, ordinary care requires him to stop his team while he may do so, and listen for the train.

Most of the cases cited by counsel for plaintiff to sustain the opposite view seem to lack some of the conditions just specified. In some of them the view of the railroad track in the direction of the approaching train was not entirely cut off. In others, the travelers did not know that a train was then due at the crossing. Because of these features it may well be held that the rule above stated is inapplicable to those cases.

Some decisions of this court, which it is claimed relieve the plaintiff of the obligation to stop his team, require brief notice. These are *Duffy v. Chicago etc. R. R. Co.*, 32 Wis. 269; *Urbanek v. Chicago etc. R. R. Co.*, 47 Id. 59; *Eilert v. G. B. etc. Co.*, 43 Id. 606.

In the first of these cases, as in this case, the plaintiff, a traveler on the highway, could not see the approaching train until too near the railroad track to avoid a collision. But, unlike the present case, there is no suggestion that he knew or had reason to believe that a train was about to pass or

would probably pass the crossing at or about the time he attempted to do so. It was held not to be his duty to stop his team, leave his wagon, go upon the railroad track, and look along the same for a train. In *Urbanek v. Chicago etc. R. R. Co.*, *supra*, the question we are here considering was not made or considered. In the remaining case of *Eilert v. G. B. etc. R. R. Co.*, *supra*, the jury found, presumably on sufficient proof, that had the plaintiff stopped within a reasonable distance of the crossing and listened, he could not have heard the rumbling of the train. If this finding is true, it would have been fruitless for the plaintiff in that case to have stopped his team. It is very obvious that neither of these cases conflict with the rule above stated, requiring the traveler, under certain circumstances, to stop and listen for an expected train before going upon the railroad track.

The material facts in the present case affecting the question of the alleged contributory negligence of the plaintiff are undisputed, and they admit of no doubtful or opposing inferences. Hence, whether or not those facts establish the negligence of the plaintiff, is a question of law for the court. The inference which the circuit court deduced from the facts was, that the plaintiff, by failing to stop his team so that he might listen for the expected train most effectually, failed to exercise that reasonable and proper care and caution to avoid injury which the law exacts of him as a condition precedent to his right to recover in this action. We are satisfied that this is the only inference which can properly be deduced from the facts proved.

We hold, therefore, both on principle and authority, that because the plaintiff, when traveling on Bridge Street towards the crossing, could not see a train approaching from the north until it was too late for him to avoid a collision therewith, should it pass when he reached the crossing, because he did not hear the train and there were noises near him and an unfavorable wind which necessarily interfered with his hearing it while his team was in motion, and because he knew that a train was due at the crossing at about the time that he reached there, and expected it would then pass the crossing, the law required him to place himself in a more favorable situation to hear by stopping his team and again listening for the expected train before going upon the railroad track. Failing in this, he is chargeable with negligence which contributed proximately to the injuries of which he complains, and cannot recover

damages for such injuries. We conclude that the circuit judge properly directed the jury to return a verdict for the defendant.

By the COURT. Judgment affirmed.

DUTY OF TRAVELER ON HIGHWAY WHEN ABOUT TO CROSS RAILROAD is to stop, and look and listen, if danger is fairly to be apprehended: Note to *Wilcox v. Rome etc. R. R. Co.*, 100 Am. Dec. 448; and see note to *O'Connor v. Missouri P. R'y Co.*, 4 Am. St. Rep. 364, and note 368, where the cases and notes on this point are collected.

QUESTION OF CONTRIBUTORY NEGLIGENCE MAY BE ONE OF FACT FOR THE JURY, OR OF LAW FOR THE COURT. As to when a question for the jury, see *O'Flaherty v. Union R. R. Co.*, 100 Am. Dec. 343; *Detroit etc. R. R. Co. v. Curtis*, 99 Id. 141, and note 144; *Morrissey v. Wiggins F. Co.*, 97 Id. 402; *Hill v. Town of New Haven*, 88 Id. 613; *Johnson v. Bruner*, 100 Id. 613, and note 618. As to when a question of law for the court, see note to *Wilcox v. Rome etc. R. R. Co.*, 100 Id. 448; *Todd v. Old Colony etc. R. R. Co.*, 83 Id. 679, and note 680; note to same case on former appeal, 80 Id. 53; note to *Tolman v. Syracuse etc. R. R. Co.*, 50 Am. Rep. 653.

WILL OF WARD.

[70 WISCONSIN, 251.]

WILL OF MARRIED WOMAN IS NOT REVOKED BY HER SUBSEQUENT MARRIAGE, where the statute secures to her the absolute right to dispose of her property during coverture; and there being no other issue than the children of a former marriage, her estate is given by said will to them. Whether such marriage would revoke a former will in favor of a stranger was undetermined.

THE testatrix, Ann Ward, was married three times. Her first husband was one Thomas Lee, who deceased in 1870. Under the will of said Lee she obtained the estate possessed by her at her decease. During the marriage with her second husband, John Spaulding,—who died in 1880,—the will here in question was executed on June 23, 1877, by the testatrix, under the name of Ann Lee Spaulding. Thereafter, she again married one Charles Ward, and died in 1885, leaving said Ward surviving her. By said will, all her estate was left to six out of seven children who were the issue of her first marriage, no children having been had by the said Ann by either the second or third husband. The testatrix was domiciled and died in Racine County. The will was duly presented to the county court of Sauk County for admission to probate. Said court held that said marriage with Ward revoked the will; that the said Ann died intestate, and

appointed one Drinkwater, who was never related to the testatrix, administrator on said estate. An appeal was thereupon taken from said order and judgment to the circuit court by Hiram Lee, named as one of the executors in said will, which court held that said marriage did not revoke said will, and reversed the judgment of the county court. An appeal from the judgment entered thereon was taken by Edward, Thomas, and Richard Lee, and by Mary Hamlet, children and heirs of the deceased, to this court.

John Barker, for the appellants.

Hand and Flett, for the respondents.

CASSODAY, J. The testatrix made her will while she was the wife of Spaulding. By it she gave her property to six of her children by a former marriage. After his death, she married Ward. She never had any children by either of them. Did such marriage to Ward revoke her will thus made? This is the only question presented which it is necessary to consider. The county court held that it did. The circuit held that it did not, and reversed the judgment.

After prohibiting the revocation of any will otherwise their by burning, tearing, canceling, or obliterating the same, or by some other writing, executed as prescribed, substantially as required by section 6, chapter 3, 29 Car. II. (3 Eng. Stats. at Large, 385), our statute adds: "Excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator": R. S., sec. 2290. This section, with the above exception, first appeared in section 10, chapter 66, Revised Statutes 1849, which went into effect January 1, 1850. "The revocation implied by law," thus excepted out from the operation of the prohibitory clause of the section by reason of such precaution, manifestly means such as had previously been implied at common law. At common law, the marriage of a woman was a revocation of her will previously made: *Forse's Case*, 2 Coke, 439; *Hodsden v. Lloyd*, 2 Brown Ch. 534; *Doe v. Staple*, 2 Term Rep. 695. This was put upon the grounds of the husband's marital rights, the ambulatory character of a will, and the disability of the wife. Thus Lord Chancellor Thurlow, after considering the rights of the husband over the property of his wife, said: "It is extremely clear that no such will made by a *feme covert* can bind after the

marriage, because it is contrary to the nature of the instrument, which must be ambulatory during the life of the testatrix; and as by marriage she disables herself from making any other will, the instrument ceases to be of that sort, and must be void": *Hodsden v. Lloyd, supra*.

But the common-law rule that marriage of a woman revoked her will previously made was not without exceptions. Thus, where her power of disposing of her separate property after marriage was preserved by an antenuptial agreement, her will previously made was not revoked by such marriage: 1 Sugden on Powers, 182-190; *Wright v. Englefield*, 1 Amb. 468; *Rippon v. Dawding*, 2 Id. 565; *Rich v. Beaumont*, 6 Brown Parl. C. 152; *Churchill v. Dibben*, 2 Keny., pt. 2, p. 82; *Logan v. Bell*, 50 Eng. Com. L., 1 Man., G. & S. 872; *Doe v. Bird*, 2 Nev. & M. 679; *Downes v. Timperon*, 4 Russ. 334; *Dillon v. Grace*, 2 Schoales & L. 456; *Braddish v. Gibbs*, 3 Johns. Ch. 523; *Barnes v. Irwin*, 2 Dall. 199; 1 Yeates, 221; 1 Am. Dec. 278.

The power which at common law might thus be preserved to a married woman by marriage settlement to dispose of her property during coverture has been expressly preserved to married women in this state by statute ever since February 1, 1850: Laws of 1850, c. 44, secs. 1-3; R. S. 1858, c. 95; Id., secs. 2340-2343. This must be qualified to the extent of saying that she could not dispose of her property by last will and testament, without the consent of her husband, until March 23, 1859: R. S. 1849, sec. 1, c. 66; R. S. 1858, sec. 1, c. 97; Laws 1859, sec. 2, c. 91. But since that time she has had the absolute power of disposing of her property in that way without his consent, and even against his wish: R. S., secs. 2277, 2281. The rights and powers thus secured to married women by the statutes remove every reason upon which the common-law rule of revocation by such subsequent marriage was based, and hence such rule by implication is removed by the same statutes. The reason for the rule having ceased to exist, the rule itself also ceased. This is in accordance with a well-settled maxim of the law. Regardless of that principle, it has been held in Massachusetts that the marriage of a woman revoked her will previously made, notwithstanding such statutes: *Swan v. Hammond*, 138 Mass. 45; 52 Am. Rep. 255; *Blodgett v. Moore*, 141 Mass. 75. Such ruling was based, apparently, upon the fact that the statute there, as here, prescribes the modes of revoking wills, and recognizes revocation implied by law. But the old English statute cited also prescribed such modes of

revoking wills without such express recognition. It is true, nevertheless, such revocations were implied, notwithstanding, among other reasons, for those stated above. As observed, the statutes of this state thus removing the reasons, to that extent removed the rule. The fact that such rule at common law was based upon the husband's marital rights, the ambulatory character of the will, and the disability of the wife, seems to be recognized in a later case in Massachusetts, where it is, in effect, held that revocation of a woman's prior will by marriage was prevented by an antenuptial agreement barring such rights, and removing such disability, and preserving such powers: *Osgood v. Bliss*, 141 Mass. 474; 55 Am. Rep. 488.

To hold that marriage of itself revoked a former will of the wife, under the circumstances here presented, as above stated, when the next day after the marriage she had power to reinstate the same writing as her last will and testament, would seem to be absurd. The conclusions we have reached are supported by the great weight of authority of our sister states under similar statutes: *In re Tuller's Will*, 79 Ill. 99; 22 Am. Rep. 164; *Noyes v. Southworth*, 55 Mich. 173; 54 Am. Rep. 359; *Webb v. Jones*, 36 N. J. Eq. 163; *Fellows v. Allen*, 60 N. H. 439; 49 Am. Rep. 329; *Hoitt v. Hoitt*, 63 N. H. 475; 56 Am. Rep. 530; *Morton v. Onion*, 45 Vt. 145; *In re Carey's Estate*, 49 Id. 236; 24 Am. Rep. 133.

Whether, in view of our statutes making husband and wife heir to each other in the absence of children, marriage of itself would revoke a former will in favor of a stranger, as seems to have been held in an early Illinois case qualified in the above citation from that state, we are not here called upon by the facts to consider. We must hold that the common-law rule mentioned, when applied to the facts of this case, has by implication been abrogated by our statutes.

By the COURT. The judgment of the circuit court is affirmed.

MARRIAGE OF WOMAN OPERATES AS REVOCATION OF WILL, WHEN: See the note to *Young's Appeal*, 80 Am. Dec. 516-518, where many cases are cited.

POWERS OF MARRIED WOMAN TO MAKE WILL: See note to *Cutler v. Butler*, 57 Am. Dec. 340, where this point is considered *in extenso*. See also *Fellows v. Allen*, 49 Am. Rep. 328, and note 329; *Swan v. Hammond*, 52 Id. 255. In the last case it is decided that a woman's will is revoked under the Massachusetts statute by her subsequent marriage.

EWALD v. CHICAGO AND NORTHWESTERN RAILWAY
COMPANY.

[70 WISCONSIN, 420.]

MASTER AND SERVANT. — Where a party is injured by being jammed between two cars while going along a beaten path, accustomed to be kept open between said cars, which path had been used for a long time prior thereto by the company's employees, and over which he was walking in order to commence his usual duty as a wiper of locomotives for the defendant company, such party is the company's employee, although he was not actually laboring for it at the time of said injury; in such case said employee is a fellow-servant of those in management of the train, whose negligence caused the injury, and he cannot recover for said injury.

Austin, Runkel, and Austin, for the appellant.

Jenkins, Winkler, and Smith, for the respondent.

ORTON, J. The following portions of the complaint sufficiently raise the questions involved: "That this plaintiff was, at the time hereinafter mentioned, employed by said defendant as a laborer, and his duty was to attend to the wiping and cleaning of locomotives belonging to said defendant, in the night-time and after they were removed from the tracks and into the round-house; that he had nothing whatever to do with the operation of said railroad or any of its rolling stock, and was not employed in any capacity upon any of the trains of said company, but his employment was confined exclusively to cleaning engines after they were run into said round-house; that on the fifth day of February, 1886, at about six o'clock in the evening of that day, this plaintiff was proceeding with due care and caution through the yard of the defendant to commence his night's work and labor in the round-house of said company; that he was walking in the usual and beaten path that had been worn and used by himself and others employed in said round-house for a long time prior to said last-mentioned date in going to and from his and their work; that in order to reach said round-house it was necessary for him to go upon said pathway and to cross the track of said defendant company in its said yards; that as he approached said track he noticed that it was occupied by a number of freight-cars, and that said cars were uncoupled and separated, and a space left between said cars where the aforesaid beaten path crossed said railway track." The complaint then substantially charges that the defendant well knew that such opening between the

cars at said path was accustomed to be kept open for the use of its employees going from and coming to said round-house, and that the plaintiff had long known of such custom; that as he approached said track he looked up and down, and listened, and saw no engine, and no person at the crossing having charge of said train, and heard no noise or signal or anything to indicate that the cars were to be moved, and that he thereupon stepped in between said cars on said pathway, and before he could get across the defendant negligently and carelessly caused said cars to be jammed together by one of its locomotives, without warning by bell or whistle, and the plaintiff's arm was caught between the bumpers to said cars, and he was dragged by the movement of the train about sixty feet and greatly injured.

To this complaint the defendant interposed a general demurrer that it stated no cause of action; and the demurrer was sustained, presumably upon the ground that the plaintiff's injury was caused by the negligence of his fellow-servants or co-employees.

It would seem that in the county court the only question was, whether the plaintiff, as a wiper of engines in the round-house, was a fellow-servant of the engineer or conductor of the freight train, or those having charge of the same, so that he could not recover by reason of their negligence. But in this court the main question seemed to be that at the time of the injury the plaintiff was not an employee of the defendant, because not then actually employed in the service of the company, but was merely going to the round-house, the place of such employment or service. This question would seem to be foreclosed by the allegations of the complaint. It is alleged that at the time thereafter mentioned, viz., at about six o'clock on the fifth day of February, 1886, the time when he was injured, the plaintiff was employed by the defendant as a laborer to attend to the wiping and cleaning of locomotives, etc.

Then again, the plaintiff bases his right to be on that pathway on the grounds of the company, and to pass safely through the opening of the cars thereon, and to have it kept open for him, solely upon the fact that he was at that time an employee of the company with others who were accustomed to use the same going from or returning to their work in the round-house. It is not alleged that the company owed the plaintiff any duty to keep open for him that pathway or to

look out for his safety thereon, except as he was an employee of the company and in its service at the time. Otherwise, he was a stranger, intruder, and trespasser upon the grounds of the company, and the company was not charged with any duty towards him or such persons at that place. It follows that if the company was charged with any liability to the plaintiff for the negligence of its servants and employees, it is because he was a co-employee of the company or fellow-servant with them. It is the *gravamen* of the complaint that, by custom having the force of contract, the company kept open, and was bound to keep open, that pathway between the cars for the use and convenience of the plaintiff and other employees of the company whose business it was to do the wiping and cleaning of the engines in that round-house of the company, in going away from or returning to their said work in the round-house. It is not charged in the complaint that by custom or usage that pathway was, or was to be, kept open for the public or strangers by the company as a public or private way by dedication or consent for their use or convenience. It was solely for the use of the plaintiff as an employee or servant, and for other employees or servants of the company whose duties were performed in that round-house. By the complaint, it was a means of egress or ingress from or to that round-house, provided by the company for the exclusive use of the plaintiff and his co-employees, as useful and essential to them as a door or gateway to the round-house itself. From these facts the duty of the company to keep open this pathway for the plaintiff, and assure the safe use thereof to the plaintiff, is deduced. The company and those having charge of the train at the time were aware of this custom, and had good reason to suppose that this pathway or opening was being used at the time by the plaintiff, and was left open for him on his way to the round-house, and hence their duty to look out for his safety therein. We therefore agree with the plaintiff that he was, at the time he was injured in that pathway in the opening between the cars, in the employment of the company.

This might well end the case so far as the question whether he was then an employee of the company is concerned; and yet the learned counsel on both sides saw fit to discuss the question whether the plaintiff was really an employee at the time, and through courtesy we pass upon it as a question of law, although in some cases this question is made one of fact

for the jury. The facts being admitted by the demurrer, it may as well be treated as a question of law. We will not enlarge the question, even to the extent the argument of the learned counsel seemed to carry it, but confine it strictly to this case on its facts. As to what may be the law when an employee of a railway company is not actually employed, or at any intervals of actual labor, or going to or from his labor his own way and independently of the company, or under other circumstances, is immaterial to this case. The authorities may be in great conflict on that question; but we are not aware that they are in conflict on the question presented by the facts of this case. Here we have a private pathway over the grounds of the company, granted and allowed to the plaintiff and other employees of the company who worked in the round-house, by usage, custom, and consent, for their ingress and egress to and from their work, kept open across the track of the road, and which had been worn and used by himself and others for long time prior to the injury, and that in order to reach the round-house it was necessary for him to go upon said pathway and to cross the track of the company at that place. It was the means, and only means, of entrance and exit to and from their work furnished by the company, and the plaintiff and others had a right to its free and uninterrupted use as they always had; and it was because they were the employees of the company in the round-house that they had such right and privilege. It was an essential part and ingredient of the plaintiff's contract of employment, and incidental to it, as much as any means and facilities for his labor in the round-house itself furnished by the company.

The plaintiff, therefore, while enjoying such privilege and facility, or while passing along that pathway and between the opening of the cars, was an employee and servant of the company as much as while actually laboring for the company in the round-house, and as much within his contract of employment. On the other hand, there was, by virtue of the same contract, a corresponding duty of the company to keep that passage-way open for the plaintiff, for he had a right to be there as an employee of the company working in the round-house. If the company violated that duty, to the plaintiff's injury, by its own act or primary negligence, its liability to respond in damages is absolute and unquestionable; but, if the plaintiff has this benefit or advantage by reason of his relation to the company as an employee, he must also suffer

the disadvantage, if it be such, of being remediless against the company, if his injury in that relation was caused by the negligence of his co-employees or fellow-servants. But this will be considered hereafter.

Our present concern is, Was he, when injured, an employee of the company? The peculiar facts of this case, which make him such, appear to involve precisely the same principle as that class of cases where the plaintiff was being carried on his way from and to his place of labor by the railroad company, by consent, custom, or contract, and was injured by the negligence of other employees of the company. This carriage of the plaintiff was the means, facility, and advantage to which he was entitled by reason of his being an employee or servant, which entered into and became a part of his contract of employment, or were incidental and necessary to it. In *Gilman v. E. R. Corp.*, 10 Allen, 233, 87 Am. Dec. 635, the plaintiff was a car-repairer, and was being carried on the cars of the company to his home at night, a distance of about four miles, free of charge, by the contract. He was injured on the way by the carelessness of a switch-man of the company. It was held not only that he was an employee of the company at the time, but a co-employee of the switch-man, and could not recover. In *Gillshannon v. S. B. R. Corp.*, 10 Cush. 228, the plaintiff was a laborer repairing the road-bed several miles from his home, and was being carried on a gravel train to his work free, and by the mere consent of the company, and was injured on his way by the carelessness of those having charge of the train. Dewey, J., says in the opinion: "If the plaintiff was, by the contract of service, to be carried to the place of his labor, then the injury was received while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining an injury from the negligence of other servants. If it be not properly inferable from the evidence that the contract between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his labor and service, and is equally connected with it and the relation of master and servant, and therefore furnishes no ground for maintaining this action." This expresses the exact principle of this case. The keeping open of this pathway between the cars was a permissive privilege (established by custom in this case) granted to the plaintiff, of which he availed himself, to

facilitate his labor and service, and is connected with it and the relation of master and servant. In *Seaver v. B. & M. R. R. Co.*, 14 Gray, 466, a carpenter employed to repair the fences, bridges, etc., of the company was carried to his work on the train, and was injured by the negligence of the engineer, or of those whose duty it was to inspect the axles of the cars. It was held that he was a servant of the company, and a fellow-servant of the engineer and the others, and could not recover.

The case of *Ryan v. Chicago etc. R. R. Co.*, 23 Pa. St. 384, is closely in point. The plaintiff was a common laborer employed in digging and filling cars with gravel, etc. He lived about four miles distant from his principal work, and it was usual for him and his fellow-workmen to ride on a gravel train to and from their work, and while being so carried to his work he was injured by the carelessness of those in management of the train. It was held that he was a mere servant of the company, with the privilege of riding, as a part of his business in the gravel train, which was one of the instruments of his work; and that he sued in his true relation, not as a passenger, but as a servant; and was injured by the carelessness of his fellow-servants, and could not recover. In *Tunney v. Midland R. R. Co.*, L. R. 1 Com. P. 289, the plaintiff was a laborer with others to assist in loading a pick-up train, and it was a part of their contract of service that they should be carried to and from their work. After his work was done for the day, he was being carried to the place of his residence, and on the way was injured by the negligence of the managers of the train; and it was held that he was still a servant, and could not recover for the negligence of his fellow-servants; and the case *Gillshannon v. S. B. R. Corp.*, *supra*, is cited as authority by Field, queen's counsel. The case of *Higgins v. H. & St. J. R. R. Co.*, 36 Mo. 418, is an extreme case in favor of this principle. The plaintiff had been employed as a brakeman, but had ceased work for a considerable time, but had not been paid off. He hailed a train and took his place with other employees, and on his way he was injured. It was held that he was still an employee, and that his case did not come within the statute relating to the injury of passengers. In *Kansas Pacific R. R. Co. v. Salmon*, 11 Kan. 83, in *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134, in *McQueen v. C. B. U. P. R. R. Co.*, 30 Kan. 689, and in *Vick v. New York etc. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36, the plaintiff was a laborer, being carried by the company to or from his work, and was in-

jured by the negligence of those in charge of the train; and it was held that they were fellow-servants with him, and that he could not recover: See also *Ross v. New York Central etc. R. R. Co.*, 5 Hun, 488.

There are many other similar cases, but they need not be cited, for the principle is sufficiently established. It is questionable whether any case conflicting with these cases can be found. There are cases which seem to conflict with them, but they are those in which the facts show that the plaintiff was a passenger paying fare, or from whom fare could have been exacted. But if perchance there are such cases, we think them unreasonable, and are not disposed to follow them. But, again, it may be said that the plaintiff was still an employee because he was attempting to use the pathway between the cars as the only customary and convenient means of access to and exit from the round-house which the company had provided and was under obligation to keep open and safe for him and his fellow-workmen when he was injured. In *Brydon v. Stewart*, 2 Macq. 30, the plaintiff was a miner, and had quit work in mutiny; and yet the master was held bound to provide his safe exit from the mine as an employee or servant. We conclude, therefore, that the plaintiff when injured was an employee and servant of the company, with all the rights and liabilities implied by that relation.

2. Being an employee and servant of the company at the time he was injured, the next question is, whether he was a co-employee or fellow-servant of those in the management of the freight train, whose negligence caused the injury. The allegation of the complaint is, that the company "caused the cars to be jammed together by one of its locomotives, without warning," etc. Inferentially, at least, the negligence was on the part of the engineer of the train, who was in charge of said locomotive. But, at all events, those in the management of the train, whether as engineer, brakeman, or conductor, or one of them, was guilty of the negligence. By virtue of that custom, understanding, or contract by which the cars were to be kept open for the passage between them of the plaintiff and others employed in the round-house, the plaintiff was at the time placed in connection with those in charge of the train, and was specially dependent upon their due care and prudence in keeping the train open at that pathway. It was the plaintiff's business to wipe and clean the engines and prepare them for the road. Those whose negligence caused

his injury had charge of such an engine, through whose instrumentality he was injured. The business of the plaintiff and that of him or those whose negligence caused his injury were not very remote from each other, or in very different grade or department. They would seem to be rather intimately connected. Without discussing the rule that has been so many times before this court, we are satisfied that this case falls clearly within the rule of co-employees or fellow-servants. All the cases above cited to the point that the plaintiff was an employee held, also, that he was a co-employee of those in charge of the train, and he had nothing to do with the running of the train whatever, but was simply a common laborer on the track of the road, or a mechanic making repairs. The fact that the plaintiff and those through whose negligence he was injured are engaged in different departments of the same service, does not take the case out of the rule: *Farwell v. Boston etc. R. R. Co.*, 4 Met. 49; 38 Am. Dec. 339; *Foster v. M. C. R. R. Co.*, 14 Minn. 360; *Manville v. C. & T. R. R. Co.*, 11 Ohio St. 417; *Whaalan v. M. R. & L. E. R. R. Co.*, 8 Id. 249; *Ross v. New York etc. R. R. Co.*, 5 Hun, 488; *McAndrews v. Burns*, 39 N. J. L. 117; *Wright v. New York Central R. R. Co.*, 25 N. Y. 562; *Coon v. S. & U. R. R. Co.*, 5 Id. 492; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432. A member of a repairing gang and an engine-driver are fellow-servants within this rule: *Chicago etc. R. R. Co. v. Murphy*, 53 Ill. 336; 5 Am. Rep. 48; *Rohback v. Pacific R. R. Co.*, 43 Mo. 187; a master mechanic and locomotive engineer: *Hard v. Vermont etc. R. R. Co.*, 32 Vt. 473; the brakeman of one train and the engineer of another: *Wright v. New York Central R. R. Co.*, *supra*; a watchman at a street-crossing and a switch-tender: *Sammon v. New York etc. R. R. Co.*, 62 N. Y. 251; an employee crossing the track on his way to work and the engine-driver who backs the engine upon him: *Keyes v. Pennsylvania R. R. Co.*, 1 Bannan's Sup. Ct. Dig. 316; a car-repairer and a brakeman: *Nashville etc. R. R. Co. v. Foster*, 10 Lea, 351; 11 Am. & Eng. R. R. Cas. 180; a mechanic in the repair-shop and a brakeman: *Wonder v. Baltimore etc. R. R. Co.*, 32 Md. 419; 3 Am. Rep. 143; a section-hand and the engineer: *Clifford v. Old Colony R. R. Co.*, 141 Mass. 564; *Foster v. Railway Co.*, *supra*; *Collins v. St. Paul etc. R. R. Co.*, 30 Minn. 31; *Boldt v. New York Central R. R. Co.*, 18 N. Y. 432; *Blake v. Maine Central R. R. Co.*, 70 Me. 60; a track-man and baggage-man: *Moseley v. Chamberlain*, 18 Wis. 700; section-man and brakeman:

Cooper v. M. & P. du C. R. R. Co., 23 Id. 668; a shoveler on the track and conductor: *Naylor v. Chicago etc. R'y Co.*, 53 Id. 661; *Howland v. M., L. S., & W. R. R. Co.*, 54 Id. 226; *Heine v. Chicago etc. R'y Co.*, 58 Id. 525; brakemen and train-men: *Whitwam v. W. & M. R. R. Co.*, 58 Id. 408; car-repairer and train-men: *Luebke v. Chicago etc. R. R. Co.*, 63 Id. 91; 53 Am. Rep. 266; a track-walker and fireman: *Schultz v. Chicago etc. R'y Co.*, 67 Wis. 616; 58 Am. Rep. 881.

Many of these cases are cited in the brief of respondent's counsel, and others are found in a note to the case of *McLeod v. Ginther*, 8 Am. & Eng. R. R. Cas. 162. To cite any more analogous cases is unnecessary, after so many similar cases have been decided by this court. It is too clear for argument that the plaintiff and those whose negligence caused his injury were co-employees and fellow-servants, and that the complaint, for that reason, shows no cause of action against the company.

The last point, that at least the negligence in part is charged directly against the company as the violation of an absolute duty to keep that pathway open, and that it was a question for the jury as to whose negligence caused the injury, is not in the case. On the demurrer to the complaint, it was the duty of the court to decide whether the company was directly charged with the negligence, or its employees; and, having decided that the complaint charged the managers of the freight train with the negligence that caused the plaintiff's injury, it decided also that such persons were the fellow-servants of the plaintiff. We think the county court decided correctly. I must say for myself that I regret that such is the rule; but it has been so long established and so often reaffirmed by this court that it is now protected by the principle of *stare decisis*. Besides this, the legislature of this state has sanctioned it by repealing the statute which abrogated it.

TAYLOR, J., dissented.

By the COURT. The order of the county court is affirmed, and the cause remanded for further proceedings according to law.

The ground upon which Taylor, J., dissented was, that the plaintiff was not in the employment of the company when the accident happened, and it was argued by him that no case "can be found where a court has held that an employee was in the service of his employer so as to subject him to the rule that he assumes the risk of his employment and the dangers incident thereto

from the carelessness of his co-employees while coming to his place of employment or returning therefrom, unless he was doing so under an express or implied agreement with his employer to carry him to or from his place of employment, and when he was in fact being so carried upon the cars or other means of transportation furnished by his employer. In all the cases I can find in which that precise question has arisen, the courts have held that while going to and returning from the place of his employment after his day's work was finished and before it commenced again on the next working-day, he was not in the employ of the master, and so does not assume the risk of the carelessness or neglect of the other employees of the master." The following cases are cited as limiting the doctrine to the rule as above indicated, and also as authorities supporting the same: *Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 267, 270; 47 Am. Rep. 36; *Russell v. Hudson R. R. Co.*, 17 N. Y. 134; *Gillshannon v. S. B. R. Corp.* 10 Cush. 228; *Seaver v. B. & M. R. Co.*, 14 Gray, 466; *Kansas Pacific R. R. Co. v. Salmon*, 11 Kan. 83; *McQueen v. C. B. U. P. R. Co.*, 30 Id. 689; *Higgins v. H. & St. J. R. Co.*, 36 Mo. 432; *Baird v. Pettit*, 70 Pa. St. 477, 483; *Balt. & O. R. R. Co. v. State*, 33 Md. 542, 555; *Abell v. W. M. R. Co.*, 63 Id. 433, 441; *Broderick v. D. U. Depot Co.*, 56 Mich. 261, 267, 268; 56 Am. Rep. 382; *Hutchinson v. N. Y. & B. R. Co.*, 6 Eng. R. R. Cas. 580, 588; *O'Donnell v. A. V. R. Co.*, 59 Pa. St. 239; 98 Am. Dec. 336; *Russell v. H. R. R. Co.*, 5 Duer, 39, and explaining *Brydon v. Stewart*, 2 Macq. 30.

WHO ARE AND ARE NOT FELLOW-SERVANTS: *Tierney v. Minneapolis etc. R. R. Co.*, 53 Am. Rep. 35, and note 45; note to *Fisk v. Central Pacific R. R. Co.*, 1 Am. St. Rep. 31-33. In the latter note is cited the case of *Keyes v. Railway Co.*, 1 Bannan's Sup. Ct. Dig. 316, where it is held that an employee who crosses the track in going to work is a co-employee with the engine-driver who backs the train upon him. In *Gilman v. Eastern R. R. Co.*, 87 Am. Dec. 635, and *Vick v. New York etc. R. R. Co.*, 47 Am. Rep. 36, it was held that an employee, while carried to and from work on the employer's train, is a co-employee with the engineer of the train.

CLARK v. CHICAGO AND NORTHWESTERN R'Y Co.

[70 WISCONSIN, 593.]

COMPLAINT AGAINST PUBLIC NUISANCE, to form basis of action, must allege a special damage peculiar to the plaintiff, and resulting from an injury of a different character from that suffered by the rest of the public; nor must the damages alleged rest entirely in contemplation.

A GENERAL demurrer to the complaint was sustained, and from the order thereon the plaintiff appealed.

Moses Hooper, for the appellant.

Jenkins, Winkler, and Smith, for the respondent.

LYON, J. One who sustains special damage peculiar to himself, either in person or in property, from a public nui-

sance, whether such damage be direct or consequential, may recover the same of the person or corporation creating or maintaining such nuisance. But it is essential to a recovery in such case that the plaintiff prove the damages are special to himself; that is, that they result from an injury of a different character from the injury suffered by the rest of the public, and not a part of the common injury caused by the nuisance. "It is not enough," says Mr. Wood, in his treatise on nuisance, "that he has sustained more damage than another; it must be of a different character, special and apart from that which the public in general sustains, and not such as is common to every person who exercises the right that is injured." The above proposition is well-settled law: See Wood on Nuisance, sec. 646, and cases cited in notes.

It is sometimes difficult to determine, under the above rule, whether an alleged injury to an individual, caused by a common nuisance, is or is not of a kind that gives him a private action to recover damages therefor. To aid in determining that question, other rules have been laid down by the courts and text-writers, one of which is, that a distinction must be made between actual present damages and those which rest in contemplation. While in a proper case the former may be recovered in a private action, the latter cannot: Wood on Nuisance, sec. 659. A man may desire to do any given thing, and may be able to show that he would have saved a certain sum of money could he have performed the desired act. In one sense he has suffered damage because of such inability. This, however, is purely contemplative damage. But when he endeavors to do an act and fails, and suffers loss thereby, this may be actual, present damage, within the above rule. Under this rule, a mere obstruction to a highway on which a person desires to travel, but who makes no attempt to do so, although it exposes him to inconvenience and loss, is not ground for a private action for damages. Such damages rest in contemplation, within the meaning of the rule.

It is believed that every case in this court in which private actions for damages resulting from common nuisances, or for injunctions to restrain their erection, have been sustained, comes fairly within the rule first above stated, and that none of them trench upon the rule last stated; that is to say, in each case actual, present damages, special and peculiar to the plaintiff, were proved. Thus the alleged nuisance in *Walker v. Shepardson*, 2 Wis. 384, 60 Am. Dec. 423, greatly im-

paired the value and lawful use by the complainant of his wharf. In *Barnes v. Racine*, 4 Wis. 454, it interfered with the convenient use of the plaintiff's lots, wharfs, ship-yards, and mills, and impaired their value. In *Williams v. Smith*, 22 Id. 594, it cut off (or would have done so) the only way of access to the premises of plaintiffs. In *Enos v. Hamilton*, 27 Id. 256, it shut off access to plaintiff's mill, and deprived him of the use thereof, and prevented him from seasonably stocking it for future work. In *Wisconsin River Imp. Co. v. Lyons*, 30 Id. 61, it caused a loss to the plaintiff of six hundred dollars in tolls. In *Greene v. Nunnemacher*, 36 Id. 50, it drove customers from the plaintiff's saloon and tavern, diminished his profits, and injured the health of himself and family. And in *Gates v. N. P. R. R. Co.*, 64 Id. 64, it stopped or delayed the boats and rafts of the plaintiff in their actual passage down a navigable river, to his great damage.

The complaint in this action contains no averments bringing it within either of the above cases, nor, it is believed, within any other case ever decided by this court. The complaint herein alleges that the plaintiff owns a steam-yacht, upon which he desires to travel daily and carry passengers between Neenah and Appleton; that in his business of a manufacturer he is largely interested in transporting freight up and down the Fox River, past the point where defendant's bridge is located, and would transport such freight by river but for the bridge; but now, boat, passengers, and freight have to take a circuitous route by reason of the bridge. The complaint fails to state where the plaintiff's business is carried on, or that he owns any property affected by the alleged nuisance, or that he has ever made any attempt to pass the bridge, or that he has any riparian rights affected by it. The whole substance of the complaint is, that the plaintiff desires to navigate the Fox River where the bridge stands, with his yacht, and to transport passengers and freight up and down the river at that point, but cannot do so because of the bridge, and is compelled to take a longer route to reach desired points. If there is any element of special damage alleged in the complaint,—damage not suffered by the whole public who navigate or may desire to navigate Fox River between the same points,—we have failed to discover it. Moreover, the damages alleged rest entirely in contemplation, within the rule above stated.

We are satisfied that the complaint fails to state a cause of

action for private damages, and hence that the circuit court properly sustained the demurrer thereto.

By the COURT. Order affirmed.

DAMAGE MUST BE SPECIAL AND PECULIAR TO PERSON TO ENABLE HIM TO MAINTAIN ACTION FOR COMMON NUISANCE: *Brown v. Watson*, 74 Am. Dec. 482, and note 484; and see also, to substantially the same effect, note to *S. O. R. R. Co. v. Moore and Philpot*, 73 Id. 786. And see *Price v. Gratz*, 4 Am. St. Rep. 501, and note.

SCHWEICKHART v. STUEWE.

[71 WISCONSIN, 1.]

IF COUNTERCLAIM STATES FACTS which would constitute an affirmative cause of action but it is indefinite and uncertain as to the amount of damages sustained, its defects should be taken advantage of by motion that it be made more definite and certain, and not by demurrer.

COUNTERCLAIM. — IN ACTION ON CONTRACT for furnishing building-stone, a counterclaim for damages for delay in furnishing the material, which states that defendant was ready and willing to receive the same, and otherwise states a good affirmative cause of action, need not aver that he was ready to pay for the stone, as his contract is sufficient as to his liability and plaintiff's payment on delivery.

ID. — IN ACTION ON CONTRACT to furnish building-stone, defendant may counterclaim for damages for delay in delivering and failure to deliver a part of such stone, though he received that delivered without objection, and used it so that it could not be returned.

Fiebing and Killilea, for the appellant.

Stark and Sutherland, for the respondents.

ORTON, J. The respondents were engaged in quarrying and dealing in building-stone. The appellant had contracted to build a county jail for Milwaukee County. The respondents agreed to deliver to the appellant, in the city of Milwaukee, "all the building-stone needed or required by [him] in or about the erection or construction of said jail building, promptly and punctually, whenever [he] might want the same for such purpose, and without any delay on their part," at certain agreed rates. This action is for the recovery of the balance unpaid for the delivery of said stone. The appellant answered, among other things, by way of counterclaim, "that said plaintiffs have neglected and failed to perform said agreement on their part, in that they did not furnish and deliver such stone promptly and punctually when the same was wanted and needed by this defendant for such purpose, as

they had agreed and bound themselves to do, but compelled him to wait for such stone for an unreasonably long time after they had been requested and ordered by this defendant to deliver the same; that this defendant, at said times, as the plaintiffs well knew, was at work upon such building with a large number of men, and that by reason of such failure, fault, and neglect on part of said plaintiffs in not delivering such stone promptly and punctually, as they had so bound themselves and agreed to do, this defendant was actually and necessarily hindered and delayed in executing and completing such work, and by reason of said premises suffered and sustained great loss of time, . . . and necessarily incurred an expense of about four hundred dollars, in that he was compelled to and actually did procure and purchase such stone elsewhere, all of which to the great damage of this defendant, for which he claims the sum of four hundred dollars." The defendant prays that the plaintiffs' complaint be dismissed, and for judgment against the plaintiffs upon his counterclaim for four hundred dollars and costs. The plaintiffs replied to said counterclaim that they did deliver such stone as agreed, and that the same was received by said defendant without objection. On the trial, the respondents objected to any evidence of said counterclaim, "because it does not state facts sufficient to constitute a counterclaim," and the court sustained said objection, and directed the jury to render a verdict for the plaintiffs for the amount of their claim. On this appeal, the alleged error of sustaining the objection to any evidence of said counterclaim is the main ground urged for the reversal of the judgment, and it is unnecessary to consider any other. Those parts of the answer pertinent to this question have only been quoted. To sustain this ruling of the court, the respondents' counsel contends:—

1. That the counterclaim as to the breach and damages incurred thereby is too indefinite to constitute a substantive cause of action, and that it should allege with distinctness the nature of the damages sustained, and the definite damages sustained. In view of the well-established rule, that on a demurrer *ore tenus* the pleading should be liberally construed, we think that this counterclaim states the main facts which would constitute an affirmative cause of action. It states that by the unreasonable delay the defendant suffered damages in the sum of four hundred dollars, by loss of time and expenses. The building was delayed by it, and the de-

fendant had many hands employed, and that he was compelled to procure stone elsewhere, etc. If, as to these facts, the counterclaim is too indefinite and uncertain, the remedy is pointed out by the statute. A motion may be made to compel the defendant to make it more definite and certain: R. S., sec. 2683.

2. That the counterclaim ought to state that the defendant was ready and willing to receive the stone at the proper time and to pay for the same. As to his being ready to receive the same, the defendant alleges that he particularly requested and ordered the delivery of the stone under the contract; and as to his being ready to pay for the same, his contract is sufficient as to his liability and the plaintiffs' security for payment on delivery.

3. The third contention is the main one,—that the answer shows that the defendant received the stone without objection and had used them, so that they could not be returned; and that therefore he could not counterclaim for damages for the delay. That which was recoupment in New York and some other states before the codes is now a counterclaim under the statute: 1. "A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action": R. S., sec. 2656. The doctrine of recoupment would seem to be most applicable to just such a case as this: "The right of the defendant in the same action to claim damages from the plaintiff, either because he has not complied with some cross-obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in the making or performance of the contract": *McAllister v. Reab*, 4 Wend. 483; *McAllister v. Reab*, 8 Id. 109; *Mayor v. Mabie*, 13 N. Y. 151; *Epperly v. Bailey*, 3 Ind. 72; *Robertson v. Davenport*, 27 Ala. 574; *Wheat v. Dotson*, 12 Ark. 699; *Culver v. Blake*, 6 B. Mon. 528; *Ward v. Fellers*, 3 Mich. 281; *Higgins v. Lee*, 16 Ill. 495. But there was a limitation to recoupment which does not exist in the statutory counterclaim in this class of cases. The damages were limited to defeat the plaintiff's claim, and for no excess, and no action could be brought for the excess. At least it was so held in many of the states. The very nature of recoupment was such that, aside from it, the plaintiff might be entitled to recover; but against such recovery, the defendant might recoup his damages on account of the plaintiff's violation of the contract. It is peculiarly ap-

plicable to that class of cases where the plaintiff is bound to deliver certain material necessary to some work or engagement of the defendant, and which he well knows he must receive even long after the time fixed by the contract, or suffer far greater damages than by the mere delay of delivery. In such a case, the plaintiff may be entitled to recover on the ground that the defendant had received and used the material, and the defendant be entitled to recoup his damages suffered by the delay or any other violation of the contract by the plaintiff, to the extent of the plaintiff's claim. The substitution of the statutory counterclaim in such cases does not change its nature in these respects. This doctrine has been so long established in this state, we need not go to other states for authority.

In *Getty v. Rountree*, 2 Pinn. 379, 54 Am. Dec. 138, the plaintiff, as the manufacturer, contracted to deliver to the defendant a pump designed to exhaust water from a mine, and there was an implied warranty that it would answer the purpose for which it was intended; the defendant received and used the pump, and in an action for its price he was allowed to reduce it by his damages for its failure to work well by reason of its improper construction. The court says: "To return it and resort to an action for the recovery of their money paid would have been but adding to their losses." The case of *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737, was decided upon the authority of the above case, and is especially applicable to this case. That was an action for breach of a contract to make and set up on a steamboat, engines, etc., suitable for propelling the same, and for damages by delay and defective construction. The engine was received and used.

One of the points made by the counsel in that case was, that "the machinery was accepted and reduced to use by the plaintiff without any sufficient notice that he would claim damages." That is the main point made by the respondent's counsel in this case. After that case, the doctrine ought to have been treated as settled for this state, for the arguments and opinion are very full and elaborate. This doctrine is equally favorable to the vendor, for where the contract is apportionable, as in this case, and after the delivery of part and on failure to deliver the whole, he may sue for the contract price of that already delivered, and the defendant may counterclaim his damages against the plaintiff's claim for the violation of the contract in not delivering the whole: *Goodwin v. Merrill*,

13 Wis. 659. In *Ketchum v. Wells*, 19 Id. 34, the contract was to deliver stove bolts to the defendants; to be manufactured into barrels. Those received and used were not of good quality, and the defendant was allowed to counterclaim his damages against the price of those delivered. The cases in this court cited by the learned counsel of the respondents to this point are not applicable to such a case. The plaintiffs knew for what purpose the stone they were to deliver was to be used, and are presumed to have known the consequences of the delay. This case is a strong one for the application of this doctrine. The defendant was compelled to receive the stone, although out of time, or suffer still greater loss. The objection to any evidence under the counterclaim ought to have been overruled, for the counterclaim was clearly sufficient.

By the COURT. The judgment of the county court is reversed, and the cause is remanded to the superior court of Milwaukee County for a new trial.

DAMAGES FOR FAILURE TO EXECUTE or for delay in executing a contract at the time stipulated may be recouped in an action to recover the contract price: *Abbot v. Gatch*, 71 Am. Dec. 635, and note 644; *Griffin v. Colver*, 69 Id. 718.

COUNTERCLAIM IS THE SUBJECT OF A NOTE to *Woodruff v. Garner*, 89 Am. Dec. 482-489.

GREEN v. BATSON.

[71 WISCONSIN, 54.]

PAROL EVIDENCE OF WARRANTY OUTSIDE OF DEED. — Damages accruing from breach of warranty of the quality of land conveyed by deed may be proved by parol, to defeat an action on a note for a portion of the purchase price, and this, though the deed contains only the ordinary and usual covenants, and the covenant as to quality is not in writing.

Runals and Dunlap, and George E. Sutherland, for the appellant.

Waring, Eichstaedt, and Niskern, for the respondent.

ORTON, J. This action was brought to recover the unpaid balance of a four-hundred-dollar note, given by the defendants to the plaintiff as the difference on an exchange or trade of lands. The defense was, that the plaintiff, as an inducement to the trade, represented, stated, and warranted to the defendants, immediately before said sale, that part of

said land—being about forty acres—was and were good hay meadow; that said lands were then covered with snow, so that they could not be examined so as to ascertain their character in that respect, and the defendant did not know of their character as hay meadow or otherwise, except what the plaintiff had so told, represented, and warranted, and that it was impossible for him then to see or know that the plaintiff's statements, representations, and warranty were false and not true; and that, putting faith, confidence, and reliance in and upon such statements, representations, and warranty, and believing the same to be true, the defendants made the said trade or exchange and gave the said notes as the supposed difference between the value of said tracts of land; that in fact and truth said lands were not as they were so stated, represented, and warranted to be, and that not more than fifteen acres of said land were good hay meadow, or would produce or raise good hay, but were nearly or wholly worthless, and of much less value than they would have been if they had been as so stated, represented, and warranted, and were worth \$250 less than they would have been had they been as so stated, represented, and warranted; and that the defendants were thereby damaged in said sum of \$250, which they recouped against the plaintiff's claim; and no judgment for any excess is demanded. On the trial the defendants made many attempts and asked many questions to prove the said false statements, representations, and warranty set forth in their answer; but on objection,—1. That it is parol evidence in regard to the sale of land; and 2. That it appears in the deed there are several warranties, and you cannot add other warranties by parol,—the court ruled out all of such evidence, and, on motion, directed a verdict for the plaintiff for the whole amount of his claim. From the judgment entered upon said verdict this appeal is taken.

If this defense may be proved by parol, then there is no question but what it constitutes recoupment,—“the right of the defendant, in the same action, to claim damages from the plaintiff, either because he has not complied with some cross-obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in the making or performance of that contract”: *Schweickhart v. Stuewe*, 71 Wis. 1 [*ante*, p. 190]. The question, therefore, presented by the numerous exceptions is narrowed down to this: May the damages accruing to the defendants from the breach

of the plaintiff's warranty of the quality of the land conveyed to the defendants, by deed in this exchange of land, be proved by parol to defeat the plaintiff's claim? The circuit court held that they could not. The ground assumed by the learned counsel of the respondent is, that the deed contained all the covenants which could be proved; and the contract of the parties being in writing, parol evidence could not be given to alter, vary, change, or add to it. As a general rule, when the contract of the parties is reduced to writing and is apparently complete, the written instrument is supposed to contain the whole contract, and it cannot be varied by parol. This perhaps is the universal rule in respect to contracts relating to personal property. But contracts in respect to the sale and conveyance of land form an exception to this general and salutary rule. It might be more proper to say that such contracts do not come within the general rule. Preceding the conveyance, there is, of course, always an agreement of sale. The deed may contain a very small part of such contract. The deed is made only in execution of the contract. It does not attempt to state the entire agreement in respect to the subject-matter, but is merely adapted to transfer the title in part execution of the contract, and is manifestly incomplete. Deeds are supposed to contain only the ordinary covenants of title, and seldom, if ever, contain a covenant of warranty in respect to the quality of the land. This deed is in the ordinary form, and contains only the ordinary covenants. Therefore an agreement or covenant of warranty as to the quality of the land, and as to many other things which were a part of the prior or contemporaneous agreement of sale, may be shown by parol. Such evidence does not affect the deed or change it in any respect.

This court has recognized this exception in respect to deeds of conveyance in *Hahn v. Doolittle*, 18 Wis. 196; 76 Am. Dec. 757; and in *Hubbard v. Marshall*, 50 Wis. 326. This is the general doctrine of the courts of this country: Wood on Presumptive Evidence, 5690; 2 Wharton on Evidence, sec. 1026; *Chapin v. Dobson*, 78 N. Y. 74; 34 Am. Rep. 512. The doctrine is well expressed in *Miller v. Fichthorn*, 31 Pa. St. 260: "A conveyance of land may be complete for its purpose, which is to declare and prove the fact of conveyance; yet very naturally and commonly it is but a part execution of a prior contract, and parol evidence is admissible to show the true consideration for which it was given, and all other parts of the

transaction, provided the fact of conveyance be not affected by it": *Carr v. Dooley*, 119 Mass. 294; *McCormick v. Cheevers*, 124 Id. 262. In *Ludeke v. Sutherland*, 87 Ill. 481, 29 Am. Rep. 66, the sale and the conveyance were for 140 acres of land, and, as a part of the agreement of sale, if on a resurvey the tract should contain more than 140 acres, the grantee was to pay for it at the same rate, and if less, the grantor should restore the excess paid or promised. This agreement was allowed to be proved by parol, and such excess was recouped against the note of the grantee in suit. In *Buzzell v. Willard*, 44 Vt. 44, it was part of the contract of sale that the grantor should put a wheel into the mill. It was allowed to be proved by parol: See also *Ingersoll v. Truebody*, 40 Cal. 603; *Kingsbury v. Moses*, 45 N. H. 223. It is useless to prolong the citation of authorities beyond the above, which were furnished by the counsel of the appellant. This doctrine is not shaken or even affected by the authorities in the brief of the respondent's counsel. They relate to agreements which are supposed to be wholly reduced to writing, and in respect to personal property and other transactions.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

PAROL EVIDENCE, WHEN ADMISSIBLE TO SHOW WARRANTY OUTSIDE OF CONTRACT. — No rule of law is better settled or more firmly established than that, where a contract for the sale of property is reduced to writing, it is not competent for the parties to introduce parol evidence to ingraft new terms or conditions thereon in the nature of a warranty. No citation of authority is needed to substantiate the rule that where, in the absence of fraud, accident, or mistake, the parties have deliberately put their contract into a writing, which is evidently complete in itself, and couched in such language as imports a legal obligation, it is conclusively presumed that they have introduced into the written instrument all material terms and circumstances relating thereto, and consequently all prior conversations and negotiations are deemed to be merged therein, and parol evidence of conversations held between the parties, or of declarations made by either of them, whether before or after the completion of the contract, will be rejected. But where the contract as expressed in the writing is manifestly incomplete, parol evidence is admissible to show a contemporaneous agreement that the property should be of a particular quality, kind, or quantity; or if such contract consists of an informal bill or receipt not intended to embrace the entire contract, parol evidence of a warranty is admissible: *Hahn v. Doolittle*, 18 Wis. 196; 86 Am. Dec. 757; *Chapin v. Dobson*, 78 N. Y. 74; 34 Am. Rep. 512; *Batterman v. Pierce*, 3 Hill, 171; *Stacy v. Kemp*, 97 Mass. 168; *Atwater v. Clancy*, 107 Id. 369; *Hogins v. Plympton*, 11 Pick. 97; *Scott v. Sweet*, 2 G. Greene, 224. Perhaps the leading case on this topic is that of *Chapin v. Dobson*, *supra*. In that case, the parties entered into a parol agreement that plaintiff should

furnish defendant with certain machinery at a designated price, and that defendant should accept and pay for the same in a specified manner, and that plaintiff should guarantee the machines to do plaintiff's work satisfactorily. This agreement was put into writing and signed without including the guaranty, and the court held that it was competent to admit parol evidence to add the guaranty, placing its judgment upon the ground that the agreement was collateral, and that the written contract was manifestly incomplete, as it was in fact found to be, both by the referee and by the court. In a late case in Iowa, the doctrine of the New York case is expressly repudiated, and we think with good reason. In the Iowa case it was held that in the absence of fraud, accident, or mistake it was incompetent to show a parol warranty of agricultural implements sold by written contract containing no warranty: *Mast v. Pearce*, 43 Am. Rep. 126, and see the note thereto at page 128. Cases are found, however, which maintain that where the contract of sale is incomplete, a parol warranty may be shown, as where, in the sale of a horse, a bill of sale is given and a receipt taken for the purchase price, parol evidence is admissible to show that the seller at the time of the sale warranted the horse to be sound, as that did not contradict or vary the writing: *Hersom v. Henderson*, 21 N. H. 224; 53 Am. Dec. 185; *Perrine v. Cooley*, 39 N. J. L. 449; *Filkins v. Whyland*, 24 Barb. 379. So where a bill of parcels merely shows a sale of cloves without designating any particular kind, it may be shown by parol what kind of cloves were exhibited as a sample at the time of the sale: *Bradford v. Manly*, 13 Mass. 139, 140; 7 Am. Dec. 122. Or where the seller agreed in writing to ship to the buyer a certain quantity of "good fine wine," parol evidence is admissible to show the actual terms of the sale, and that the wine shipped was that selected by the buyer himself: *Hogins v. Plympton*, 11 Pick. 97. Where tobacco is sold by sample, and it is warranted that that furnished shall be like the sample exhibited, and a receipted bill of parcels is given by the seller, it is not such a memorandum of the contract of sale as will exclude parol evidence of the warranty and the breach thereof: *Atwater v. Clancy*, 107 Mass. 369. And under the same circumstances, parol evidence was admitted to show a verbal warranty that hops sold should be "of the first quality": *Wallace v. Rogers*, 2 N. H. 506. So where a sale was made with warranty, but was made verbally and upon credit, and the seller afterwards sent a written bill of sale to the buyer, stating quantity and price only, and then shipped the goods, it was held that parol evidence was competent to show the verbal warranty: *Foot v. Bentley*, 44 N. Y. 166; 4 Am. Rep. 652. In an action on a note given for a patent right to make fanning-mills, which were verbally warranted to do good work, parol evidence is admissible to show that such mills, made after the model on which the letters patent issued, were worthless, and thus defeat the consideration of the note: *Scott v. Sweet*, 2 G. Greene, 224. So where a note and mortgage are assigned in writing containing no warranty, it may be shown by parol that the assignor verbally warranted the security: *Hahn v. Doolittle*, 18 Wis. 196; 86 Am. Dec. 757. In a suit for carrying goods, defendant set up by way of defense that the freight was done under a written contract, which was introduced and proved. Plaintiff then showed that the original contract was oral, and that subsequently plaintiff's agent reduced it to writing, and it was then signed by the parties. But defendant proved that a material stipulation, as to the time when the freight was to be delivered, was omitted, and instead words were inserted which permitted delivery at such times as desired; that, when signing the contract, he discovered the change and called plaintiff's agent's attention to it, when the latter

replied, "that was understood," and that it was the intention to deliver within the time. And the court held that evidence was admissible to show the oral agreement, on the ground that to take advantage of the omission in the contract, as written, would be a fraud on one of the parties: *Powelton Coal Co. v. McShain*, 75 Pa. St. 245. It seems to be pretty well established that in a sale of goods by sample, where an oral warranty is made that the bulk of goods delivered shall correspond to the sample, and a memorandum of the sale is made in writing and signed by the parties, but is silent as to the warranty, parol evidence of the statements made by the seller previous to the sale respecting the warranty of the bulk of the article as compared with the sample is admissible: *Koop v. Handy*, 41 Barb. 454; *Sutton v. Crosby*, 54 Id. 80; *Boorman v. Jenkins*, 12 Wend. 566; 27 Am. Dec. 158; *Casidy v. Begoden*, 6 Jones & S. 180.

PAROL EVIDENCE TO SHOW WARRANTY OUTSIDE OF DEED OR OTHER AGREEMENT RELATING TO LAND. — To allow the introduction of parol evidence to prove a warranty which was a part of the prior or contemporaneous agreement, and about which the deed or other writing is silent, is certainly in direct contradiction to that elementary and universally recognized rule of law and of reason, that in the absence of fraud or mistake parol evidence cannot be received to contradict or vary the terms of a written contract. For it is the plain and recognized doctrine, and may be said to be an elementary principle, that upon the execution, delivery, and acceptance of a deed or written instrument, all prior or contemporaneous parol stipulations, or understandings as to warranty, or incidents in any way relating to the subject-matter, are merged in the deed or writing, and cannot be contradicted or varied by parol. Mr. Wharton, after stating similar principles, says, — and cites a multitude of cases in support thereof, — that "to deeds the rules just expressed are eminently applicable, for the reason that the more solemn are the formalities prescribed by a dispositive document, and the more permanent are meant to be the dispositions it makes, the more unjust is its variation by an agency so liable to careless or fraudulent falsification as is unwritten speech. Hence it is that the courts are uniform in their refusal to admit, except in cases of fraud or gross concurrent mistake, parol evidence to contradict or to vary the terms of a deed as between the parties. . . . To deeds also is the rule applied, that to what is written no new ingredients can be added by parol." In applying this doctrine, it has been held that a limited warranty in a deed cannot be extended to a general warranty by proof of a parol agreement to that effect, made at the time of the delivery of the deed: *Raymond v. Raymond*, 10 Cush. 134; *Dutton v. Gerrish*, 9 Id. 89; 55 Am. Dec. 45. Parol evidence of a verbal warranty of the quantity of land conveyed by deed is inadmissible, as tending to vary and contradict the terms of the instrument: *Cook v. Combs*, 75 Id. 241, and note 242; *Martin v. Hamlin*, 100 Id. 181; *Cabot v. Christie*, 1 Am. Rep. 312, where it is said that a deed purports to contain all the covenants of the grantor with respect to the land conveyed, and that to add a new covenant by parol would be a palpable violation of the rule that written instruments are not to be varied by parol or oral testimony. So where the deed is absolute in form, a verbal warranty in the nature of a condition made prior to its execution cannot be ingrafted upon the deed by parol evidence: *Marshall County etc. Co. v. Iowa etc. Synod*, 28 Iowa, 360; *Bryan v. Swain*, 56 Cal. 616. And the covenant implied by the acceptance of a deed expressly warranting against all claims except certain taxes cannot be defeated by oral evidence of a verbal and contemporaneous warranty to pay such taxes: *MacLeod v. Skiles*, 51

Am. Rep. 254. Nor can a breach of covenant against encumbrances in a deed be shown by parol evidence that a few days before the execution of the deed the parties orally agreed that in consideration of the deed, for a certain sum, the grantor would assume liability to an assessment upon the land for betterments: *Flynn v. Boumeuf*, 58 Id. 135. Parol evidence will not be admitted to defeat a right to land conveyed by deed, when its object is to establish a condition subsequent in the nature of an oral warranty: *Galveston etc. R. R. Co. v. Pfeuffer*, 56 Tex. 66; *East Line etc. R. R. Co. v. Garrett*, 52 Id. 133. These cases are amply sufficient, we think, to show that when it is offered to prove by oral testimony that at the time when verbal negotiations were being carried on by the parties, with a view to consummating a sale of land, the vendor made some warranty directly affecting such land, and the parties afterwards perfected the sale by deed, which is silent as to such warranty, the prior verbal covenant or warranty is merged in the deed, and the evidence is not admissible to prove it, for its only effect, if admitted, would be to vary and contradict the deed, which it is, as before stated, clearly incompetent to do. And in all those cases where parol evidence has been admitted, it was not done on the ground that the deed could have a warranty not mentioned therein added to it by parol; but it was admitted because it tended to establish a collateral and distinct undertaking, separate and apart from the deed; and in the case of *Miller v. Fichtthorn*, 31 Pa. St. 252, cited in the principal case, the court distinctly say that in such cases the parol evidence is not admitted for the purpose of affecting the interpretation of the particular writing which the party is called upon to meet, but for the purpose of enlarging the juridical sphere of action, so as to embrace the whole transaction to which the writing belongs, and define the rights growing out of the case. "As effective of the special purpose for which a written instrument is executed, the writing, when there is no legal or equitable objection to its validity and completeness, is exclusive of all oral testimony to establish the fact or facts declared by it, but it does not exclude oral testimony of collateral facts, which, according to the purpose of the instrument, could not be declared in it, even though these facts show a countervailing right that neutralizes the obligation defined by the writing." Where, in the sale of a mill by deed which was silent as to the warranty offered to be proved, parol evidence was held admissible to prove that it was agreed that if the wheel in the mill was not satisfactory a new one should be put in, and the evidence was admitted not to affect the deed as a conveyance, but to prove an independent agreement collaterally connected with the sale of the mill: *Buzzell v. Willard*, 44 Vt. 44. So where the vendor sold a grocery store for a sum of money stated in the deed, and orally agreed not to carry on the same business within a certain distance, it was held that such verbal agreement was consistent with the deed, and did not relate to the conveyance of land, and so might be proved by parol: *Pierce v. Woodward*, 6 Pick. 206. In the case of *Carr v. Dooley*, 119 Mass. 294, cited in the principal case, when the negotiations for the purchase of the land were taking place, the vendee called the vendor's attention to a sewer which was being constructed in the street abutting on the land, and asked him who was to pay for it. He replied that he would. A deed with warranty against encumbrances was executed, but was silent as to the sewer. The vendee afterwards paid the assessment, and in his action against the vendor for the sum paid it was held that parol evidence was competent to prove the special promise to pay the assessment, and that it was not open to the objection that it varied or enlarged the deed. In *McCormick v. Cheevers*, 124 Mass. 262, also mentioned

in the principal case, it appeared that the mayor had ordered the lots which were the subject of the deed to be filled to a certain grade, and the vendee before accepting the deed said to the vendor: "You have to pay for the filling in." He replied: "All right; I will pay it." The deed was then delivered, and the purchase-money paid. The vendee paid the assessment for filling in, and in an action to recover the amount thereof from the vendor was allowed to prove by parol the independent and contemporaneous agreement.

While these cases do not profess to depart from the general rule, which rejects parol evidence when offered to vary or enlarge a written contract, they seem to us to proceed to evade that rule, without suggesting any general test by which to determine when such evasion is proper. In fact, while professing to respect the rule, they refuse to apply it; and if they be judicially sound, we know not when the rule may not be held inapplicable, or whether the existence of the rule ought to be affirmed or denied with the more confidence. They furnish additional proof that hard cases "are the quicksands of the law"; in which quicksands the law is either hidden from sight or smirched beyond recognition.

COLE v. CHICAGO AND NORTHWESTERN R'Y Co.

[71 WISCONSIN, 114.]

MASTER AND SERVANT—SERVICE OUTSIDE OF ORDINARY EMPLOYMENT.—

To make master responsible for injury to servant, it must appear that the former has neglected some duty which he owes the latter. The mere fact that the master has requested the servant to perform a temporary work outside of his ordinary employment is no violation of duty; whether it is or not depends upon the surrounding circumstances.

Id. — WHERE SERVANT IS ORDERED TO PERFORM WORK OUTSIDE OF HIS ORDINARY EMPLOYMENT, of a dangerous character, requiring peculiar skill in its performance, and the servant has not the requisite knowledge or skill required, and such want of skill or knowledge is known or might be reasonably supposed to be known to the master, in case the servant is injured while so employed the master is liable, even though the servant undertook the work without objection or protest on his part.

Id. — TO MAKE MASTER LIABLE THROUGH NEGLIGENCE for resulting injuries to servant ordered to perform duties outside of his ordinary employment, it must be shown that the master knew, or by the exercise of reasonable care and observation might have known, of the inexperience, disqualification, and immature judgment of the servant employed to perform the duty required.

Id. — WHERE SERVANT OF MATURE YEARS and of ordinary intelligence and experience is directed to do a temporary work outside of his ordinary employment, and consents to do such work, without objection on account of his want of knowledge, skill, or experience in performing such work, and injury results to him, negligence cannot be predicated upon these facts alone against the master.

ACTION to recover damages for personal injuries received while engaged in coupling cars. The opinion states the facts.

Jenkins, Winkler, and Smith, for the appellant.

Sutherland and Sutherland, for the respondent.

TAYLOR, J. Upon the argument of the appeal in this court it was not deemed by the learned counsel for the respondent that there was sufficient evidence in the case to sustain a verdict in favor of the respondent, on the ground that the defendant was guilty of negligence in furnishing him unsuitable or unsafe machinery for doing his work, or that the company was guilty of negligence in employing a careless or incompetent engineer for managing the engine which was used in the performance of the work in which he was engaged when the injury was sustained by him. As to the competency of the engineer in charge of the locomotive, no evidence was given, or, if given, no claim was made that he was incompetent.

As to the dangerous and unsafe condition of the engine and tender used in doing the switching of the cars to be switched, some evidence was given; but it is not claimed by the learned counsel for the respondent that, on the findings of the jury upon that question, the plaintiff would be entitled to recover upon that ground alone. By an examination of the answers to the first eight questions submitted to the jury as a part of the special verdict, it is very clear that the defect in the tender which it is claimed was the proximate cause of the injury was not shown to have been known to the defendant, nor that it was of such long standing that, in the exercise of ordinary care in that respect, the company ought to have known of such defect.

The only ground for sustaining the verdict in favor of the plaintiff relied upon by the learned counsel for the respondent is, that, at that time the plaintiff was directed to do this switching by the company, he was not employed by the company to do such work; that the work of switching in the yard of the defendant was dangerous work, and that the plaintiff was not accustomed to do such work, nor was he acquainted with the danger incident thereto; and that in such case the defendant is liable for the injury if the injury was caused by the negligence of the engineer in charge of the engine, or by a defect in the machinery, whether such defect was known to the defendant company or not. If this rule be as claimed by the learned counsel for the respondent, the findings of the special verdict, are perhaps sufficient to sustain the verdict, when aided by the undisputed evidence in the case. By an examination of the

findings from the ninth to the sixteenth inclusive, it will be seen that there is no finding that the defendant company directed the plaintiff to do this work of switching, nor that such work was not such as the plaintiff had been employed to do. These two points are probably supplied by evidence which is not controverted by the defendant, and so the verdict may be aided to that extent. If it be necessary, in order to entitle the plaintiff to recover in this action, to show affirmatively that switching cars in the yard of the company is a more dangerous employment than the employment which the plaintiff had contracted with the defendant to perform, then the verdict would be insufficient for want of any such finding, or, if it be necessary for him to show that the company knew that such employment was more dangerous than the ordinary employment of the plaintiff, then the special verdict would be imperfect in that respect also. The findings upon this part of the case simply show that the plaintiff used ordinary care on his part, and that the injury was either the result of the negligence of the engineer, or the defect in the tender, and that the plaintiff had not sufficient experience and intelligence to understand and comprehend the danger incident to the employment of coupling engines with a Miller engine coupler to cars.

The theory of the learned counsel for the plaintiff is, that where the master directs his employee temporarily to perform work not contemplated by his contract of employment, and such work is of a dangerous character,—whether more dangerous than his general employment or not is immaterial,—the master becomes liable to protect him while so employed against the carelessness of his employees, and also against any injury he may receive on account of defective machinery, whether the company have any previous knowledge of the defect or not. He claims that the basis of recovery in such case lies in the fact that the master directs the employee to perform a work outside of his usual employment, which is in its nature a dangerous employment; and that the mere direction of the master to perform such temporary and dangerous work is negligence on the part of the master sufficient to sustain the action of the employee so injured in the performance of such work while he is using ordinary care on his part. Stating it in a little different form, the learned counsel says that the ordinary rule that the employee assumes the dangers incident to his employment is not to be applied to the case where the em-

ployee, at the direction of the master, does work, temporarily, outside of his contract of employment.

In order to sustain the judgment in favor of the plaintiff in this case, we think it will be necessary to adopt the rule as stated by the learned counsel to its full extent, because the questions as to whether the temporary employment was more or less dangerous than the ordinary employment of the plaintiff, or whether the defendant was guilty of negligence in directing the plaintiff to do the work in the doing of which he was injured, were not submitted to the jury. The negligence of the defendant upon which the action must be sustained, if sustained at all, consists in his directing the plaintiff to do the work, and under that rule the question as to the knowledge of the employee of the dangers incident to the work to be done, or his want of knowledge, would be wholly immaterial.

We are very clear that the broad rule contended for by the learned counsel for the respondent is not sustained by the authorities, nor by the general rules of law which define the relations of the employer and employee. Some of the cases cited by the learned counsel for the respondent may have some general statements in the opinions which give some countenance to the rule as stated by counsel, but when the facts of each case are considered, it will, we think, be found that no such broad rule was ever intended to be sanctioned by any of the courts. Whether the employer is guilty of negligence, such as will entitle his employee to recover for an injury sustained while doing a temporary work outside of his contract of employment, when such injury is the result of the negligence of the co-employee, or of a defect of machinery not known to the employer, or other cause, it is in every case a question of fact to be determined by all the circumstances of the case, and cannot be predicated simply on the fact that he directed his employee to do the work.

In order to make the employer responsible for an injury to his employee while in his employ, the evidence must in every case show that the employer has neglected some duty which he owes to the employee; and no case can, we think, be found where it has been held that the mere fact that the employer requested his employee to perform a temporary work, outside of his ordinary employment, was a violation of any duty which he owes to his employee. Whether it be a violation of such duties depends always upon the surrounding circumstances. If the

particular work ordered to be done is of a dangerous character, and one which requires peculiar skill in its performance, and the person directed to perform such work has not the requisite knowledge or skill for doing the work with safety, and such want of skill or knowledge is known, or might be reasonably supposed to be known, to the employer, in that case the direction of the employer to do the work might be justly held to be a violation of a duty which he owes to his employee, even though the employee undertook to do the work without objection or protest upon his part. None of the cases go further than this, and we can see no reason for holding a stricter rule. Counsel says it is well settled that "the employee assumes all the ordinary risks within the scope of his employment." To this proposition no exception can be taken, and there is no need of the citation of authorities to sustain it. It is urged that the converse of this proposition is also true, viz., that "the servant, when he enters upon the discharge of his duties, does not assume any risks outside of the scope of his employment"; and it is also insisted that when the servant undertakes, at the order of his master, to do work outside of his ordinary employment, there is no presumption that he assumes any of the risks attending such employment. To sustain this proposition, the learned counsel for the respondent cites the following cases: *Ohio etc. R. R. Co. v. Hammersley*, 28 Ind. 374; *Lalor v. Chicago etc. R. R. Co.*, 52 Ill. 401; 4 Am. Rep. 616; *Pittsburgh etc. R. R. Co. v. Adams*, 105 Ind. 151; *Jones v. Lake Shore etc. R. R. Co.*, 49 Mich. 573; *Mann v. Oriental Print Works*, 11 R. I. 152; *Chicago etc. R'y Co. v. Bayfield*, 37 Mich. 205; *Broderick v. Detroit U. D. Co.*, 56 Id. 261; 56 Am. Rep. 382; *Cook v. St. Paul R. R. Co.*, 34 Minn. 45; *Dowling v. Allen*, 74 Mo. 13; *Railroad Co. v. Fort*, 17 Wall. 553; *Benzing v. Steinway*, 101 N. Y. 547; *O'Connor v. Adams*, 120 Mass. 427.

In the case in 28 Ind. 374, the court reversed the trial court, on the ground that the employee, a minor, assumed the risk of his employment. In *Pittsburgh etc. R. R. Co. v. Adams*, 105 Id. 151, the court state the rule as follows: "In all cases the master is bound to disclose to the servant latent defects and dangers of which he has knowledge, or of which he ought to have knowledge by the exercise of reasonable attention, care, and diligence, and of which the servant has no knowledge, and would not discover by the exercise of reasonable care. This is particularly so when the master employs for hazardous and dangerous work a child, young person, or other person with-

out experience and of immature judgment. . . . In the cases last above mentioned, the *gravamen* of the action is the negligence of the master in failing to give the proper warning, and in employing a person of such immature years and judgment that such warning and instructions would furnish no protection. And hence, in order that the master may be properly charged as being thus negligent, and made liable for resulting injury, it must be made to appear that he knew, or by the exercise of reasonable care and observation might have known, of the inexperience, disqualification, and immature judgment of the servant employed. When a person of apparently sufficient age, physical ability, and mental caliber to perform the service seeks an employment at the hands of a railway company or other master, he ought to be held to an implied representation that he is competent to perform the duties of the position he seeks, and competent to apprehend and avoid all dangers that may be discovered by the exercise of ordinary care and prudence. In such case we know of no good reason or rule of law that will compel the master to pass him through a critical examination to discover his competency for the place, or that will convict the master of negligence for not doing so."

The court further say: "When, by the orders of the master, the servant is carried beyond his employment, he is carried away from his implied undertaking to assume the risks incident to the employment. Hence it is that when a servant is thus, by the orders of the master, put to work outside of his employment, and is injured by reason of defective machinery, railroad track, etc., without his fault, the master is liable, regardless of the care he may have exercised to keep the machinery, railroad track, etc., in a safe condition. When a servant is thus ordered at work at a particular place, or with particular machinery, etc., outside of his employment, the master impliedly assures him, not only that he has exercised reasonable care to have the place, machinery, etc., in a safe condition, but also that they are in a safe condition and fit for the business for which they are used. This principle or rule of law has been more frequently and more rigorously applied in cases of employees immature in years, judgment, and experience. . . . Here, again, it should be observed that the master will not be liable if the circumstances are such as to show that the servant is competent to apprehend the danger, and expressly or impliedly assumes the risk."

We have cited at considerable length from this case, as it

goes as far to uphold the rule as claimed by the learned counsel for the respondent, if not further, than any of the other cases cited by him on the argument. And in this case the last paragraph qualifies all that is said before, and destroys the rule as contended for by the learned counsel. It leaves it, as stated above, a question of fact in all cases whether the master is guilty of negligence in directing the servant to do the act outside of his employment.

In *Lalor v. Chicago etc. R. R. Co.*, 52 Ill. 401, 4 Am. Rep. 616, it was found that the person representing the master knew that the employee whom he directed to couple the cars was unversed and inexperienced in that business. The decision is clearly placed on the ground that the master was guilty of negligence in directing a servant to do an extra-hazardous work whom he knew to be unskilled and inexperienced in the business. In *Jones v. Lake Shore etc. R'y Co.*, 49 Mich. 573, the person who was injured while employed in the discharge of work not within the contract of his employment showed that he protested against doing the work. In *Chicago etc. R. R. Co. v. Bayfield*, 37 Id. 205, the instruction at the trial, which was upheld as good law, was as follows: "If you find that the deceased, at the time he was employed by the defendant, was a lad of seventeen or eighteen years of age, inexperienced in handling the brakes on a train of cars such as that in question, and that he was unfitted for that work by reason of his unskillfulness, inexperience, and youth, and this was known to Smith, . . . and was ordered by Smith, the foreman and conductor of the construction train in question, acting for and as the agent of said defendant, then if he was killed while endeavoring to perform such work, without negligence on his part, the plaintiff was entitled to recover."

In *Broderick v. Detroit U. D. Co.*, 56 Mich. 261, 56 Am. Rep. 382, it was held that the plaintiff was entitled to recover for a defect in the construction of a ventilator which the employee was directed to open when he received his injury, and no question appears to have been made upon the point that he was doing work outside of his ordinary employment. In *Cook v. St. Paul etc. R. R. Co.*, 34 Minn. 45, the negligence for which the defendant was held responsible was in not providing a suitable place for the plaintiff to do his work. The plaintiff in this case was also a minor. In *Dowling v. Allen*, 74 Mo. 13, the person injured was a boy seventeen years old, and was working in a dangerous place, and had requested the person

directing his work to relieve him from the work and get some other person to perform it. The defendant was held liable, on the ground that he had not performed his duty in sufficiently instructing the servant of the danger incident to the performance of his work. All that was decided in *Mann v. Oriental Print Works*, 11 R. I. 152, was, that if the servant "was suddenly called upon to perform a dangerous service, not strictly within the line of his duty, and requiring peculiar skill, there would be no presumption that he knew the risks of it, and, if so, he should not have been directed to do it without information of the nature of the service." In *Benzing v. Steinway*, 101 N. Y. 547, the recovery was sustained, on the ground that the defendant did not furnish a safe place for the performance of the work which the servant was directed to do, and not upon the ground that the service was outside of his usual employment. The rule laid down in *O'Connor v. Adams*, 120 Mass. 431, and *Railroad Co. v. Fort*, 17 Wall. 553, is stated as follows: "If the defendant knew the peril to which the servant would be exposed, and did not give him sufficient and reasonable notice of it, and he, without negligence on his part, through inexperience or reliance on the directions given him, failed to perceive or understand the risk, and was injured, the defendant would be responsible." This rule was laid down in cases where the servant was an inexperienced minor.

We think that it may be safely said that none of the cases cited by the learned counsel for the respondent hold that merely directing a servant to perform a duty outside of his usual employment is such negligence on the part of the employer as will render him liable for any injury the servant may receive while engaged in such employment; but, on the other hand, all the circumstances attending the case, such as the dangerous character of the work directed to be done, the age and experience or inexperience of the servant, and the knowledge of the master as to these attendant circumstances, must be taken into consideration in determining the question of negligence.

In the case at bar, the plaintiff was a man of forty years and upwards, an intelligent mechanic. He had been in the employ of the railroad company for over ten years, and for several years had been the foreman of a gang of men employed in building and repairing bridges and other structures for the defendant on its road, and was so engaged at the

time the accident happened. In his employment he had an engine and cars under his control, for the purpose of doing his work, and a man or men whose duty it was to couple or uncouple cars as needed in such work. At the time he was requested to do the switching in the defendant's yard, he was requested to take the engine he had in use for doing his ordinary work, and the gang of men under him, and do such work. He made no objection to doing the work on the ground that it was dangerous, or that he had not sufficient knowledge or experience to do the same safely to himself and the men under his charge. Under these circumstances it seems to us that no negligence can be attributed to the company for directing him to do the work. He undertook the work voluntarily, knowing the general danger of the employment, and the rule applicable to work done in his ordinary employment must be applied to the work done by him under such order.

If the finding of the jury that the plaintiff did not comprehend the dangers incident to the work was supported by the evidence, it cannot alter the case. That fact was not made known to the defendant at the time, and there is nothing in the evidence which would tend to show the defendant that the plaintiff had not sufficient knowledge, experience, and skill to perform the work safely to himself and those in his employ.

That the plaintiff cannot recover upon the facts proved in this case is well settled by the authorities cited by the learned counsel for the appellant: *McGinnis v. C. S. Bridge Co.*, 49 Mich. 466; 8 Am. & Eng. R. R. Cas. 135; *Wormell v. Michigan Central R. R. Co.*, 1 Am. St. Rep. 321; *Rummell v. Dilworth*, 111 Pa. St. 343, 345; *Leary v. Boston and Albany R. R. Co.*, 139 Mass. 587; 52 Am. Rep. 733; *Railroad Co. v. Fort*, 17 Wall. 554, 558; *Cahill v. Hilton*, 106 N. Y. 512, 518; 3 Wood on Railway Law, 1487; Wood on Master and Servant, sec. 344; *May v. O. & Q. R. R. Co.*, 10 Ont. 70.

We are not called upon in this case to determine what the rule would be if the employee, when ordered to do work which his general employment did not require him to do, and which was dangerous in its character, objected to doing the work on the ground of want of experience and knowledge sufficient to enable him to perform the work with safety to himself and those under him, and notwithstanding such declaration on his part, his employer insisted upon his doing it, and thereupon he undertook to do the work after such protest, rather than

subject himself to the risk of being discharged from his employment. We do not in this case either affirm or disaffirm the rule stated by the supreme court of Massachusetts in *Leary v. Boston and Albany R. R. Co.*, 139 Mass. 587, 52 Am. Rep. 733, upon that state of the case. All we decide in this case is, that when an employee of mature years and of ordinary intelligence and experience is directed to do a temporary work outside of the business he has engaged to do, and consents to do such work, without objection on account of his want of knowledge, skill, or experience in doing such work, no negligence of the employer can be predicated upon that state of facts alone.

There are other reasons why the plaintiff ought not to recover in this action. He was not directed to couple or uncouple cars. He was the foreman of a gang of men, having in charge an engine and some one to do the coupling and uncoupling of cars. He was directed to take the engine and his men and do the switching of some loaded cars in the defendant's yard. The order did not direct him personally to do the coupling of the cars. Again, according to the testimony of the plaintiff himself, he was not injured on account of his inexperience in coupling cars, but by reason of a defect in the car he attempted to couple to the engine. He claims, and we are inclined to think his claim is well founded, that he would not have been injured had it not been for the projecting bolt or rod which caught his glove when he attempted to withdraw his hand from the place of danger.

In no view of the case can the verdict be sustained, except upon the theory advanced by the learned counsel for the respondent, as stated above. We think the rule of liability, as claimed by the learned counsel, is not sustained either by authority, or upon the principles of law applicable to employer and employee. Upon the undisputed evidence in the case, and upon the findings of the jury, judgment should have been rendered in favor of the appellant.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded, with directions to render judgment for the defendant.

MASTER IS LIABLE TO SERVANT when the latter is ordered to perform work outside his ordinary duties and is injured, unless the risks are explained to him, and thereafter he elects to perform such work: *Chicago etc. R'y Co. v. Harney*, 92 Am. Dec. 282; *Broderick v. Detroit etc. Co.*, 56 Am. Rep. 382; see also *Jones v. Old Dominion Cotton Mills*, 3 Am. St. Rep. 92.

IT IS DUTY OF MASTER TO WARN INFANT or inexperienced servant of danger, when ordering him to do work out of his ordinary employment: *Jones v. Old Dominion Cotton Mills*, 3 Am. St. Rep. 92, and note 106.

MASTER'S OMISSION TO GIVE INSTRUCTIONS CONCERNING DANGERS OF MACHINERY DOES NOT RENDER HIM RESPONSIBLE for injuries caused an employee, a boy twelve years of age, and of average intelligence, who had worked for nearly two months in the same room with certain machines, in the gearing of which he was caught while obeying an order of the overseer to go between the machines to look for a tool, and to hurry up: *Ciriack v. Merchants' W. Co.*, 4 Am. St. Rep. 307, and note 311.

SPIESS v. NEUBERG.

[71 WISCONSIN, 279.]

HOMESTEAD ENTRY—SUBSEQUENTLY ACQUIRED TITLE INURES TO MORTGAGEE.—Where a party, with right of pre-emption to lands, mortgages his interest for a valuable consideration, and afterwards enters as tenant of the mortgagee, and while so in possession makes a new homestead entry, commutes the same, proves his occupation, pays the price, and receives title, such subsequently acquired title inures to the benefit of the mortgagee, and becomes a lien upon the land.

H. C. COLSTAD, who had made a homestead entry on certain lands, assigned all his interest therein to the defendant, and gave him a warranty deed, which was duly recorded. Defendant executed a mortgage on the land to one Stephenson, and afterwards executed two other mortgages to plaintiff on the same land. The Stephenson mortgage was foreclosed, and at the sale plaintiff was the purchaser and received the sheriff's deed, but did not obtain the legal title, as the same was still in the United States. Defendant afterwards entered as tenant under plaintiff, and then filed a new homestead entry on the land, commuted the same, proved his occupancy, paid the government price, and received title. This action was brought to enjoin defendant from disposing of or encumbering the land, and to have the title thereto acquired by defendant inure to the benefit of plaintiff. The court refused the relief prayed for, and plaintiff appeals from the judgment.

John J. Cole, for the appellant.

G. C. Prentiss and Miller, for the respondent.

CASSODAY, J. Upon the facts stated, the inferences are irresistible that Neuberg has been in the possession of the eighty ever since he bought out Colstad and received the warranty deed of the same, May 14, 1877; that he claimed the same by

virtue of such purchase and deed and the prior homestead entry of Colstad until he lost the same by the sheriff's sale and deed. There can be no question but what the several mortgages were given to create a lien upon whatever right, title, and interest Neuberg had in the eighty as well as the other lands, and that the respective mortgagees advanced their moneys thereon in good faith and with the expectation of thereby acquiring adequate security for the same. With the same good faith and expectation, and to save her own mortgages, the plaintiff manifestly advanced the requisite amount of money on her purchase at sheriff's sale, and subsequently in paying taxes on the land. Prior to 1886, there seems to have been no pretense but what the plaintiff had acquired whether equitable right, title, and interest in the eighty Neuberg had previously possessed. During that period of three and a half years, Neuberg had remained in possession under and in subordination to such equitable right, title, and interest of the plaintiff. There can be no question but what Neuberg made the entry of January 28, 1886, and the commutation of the same, December 15, 1886, for the purpose of cutting off such equities of the plaintiff and converting the possession which he thus held under her into an adverse possession and hostile title. This was held to be legitimate by the trial court, on the theory that the mortgages were given in contravention of the provisions and policy of the United States homestead law.

1. While the title remains in the United States, it is undoubtedly true that "no lands acquired under the provisions of" that law can "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." Such is the statute: R. S. U. S., sec. 2296. This court has held that prior to such issuance of a patent such lands were not liable to attachment, execution, or mechanic's lien: *Gile v. Hallock*, 33 Wis. 523; *Paige v. Peters*, 70 Id. 178. In the case last cited it is said in the opinion, in effect, that the right of the occupant of such lands to mortgage his interest in the same does "not come within the prohibition of the federal statutes cited." That assertion is not only sustained by the authorities there cited, but others: *Nycum v. McAllister*, 33 Iowa, 374; *Fuller v. Hunt*, 48 Id. 163; *Kirkaldie v. Larrabee*, 31 Cal. 456; *Orr v. Stewart*, 67 Id. 275; 89 Am. Dec. 205; *Cheney v. White*, 5 Neb. 261; 25 Am. Rep. 487; *Jones v. Yoakam*, 5 Neb. 265. We are not aware of any adverse decision in the supreme court of the United States.

2. But the same chapter of the Revised Statutes of the United States in effect provides that nothing therein "shall be so construed as to prevent any" homesteader "from paying the minimum price for the quantity of land so entered, at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting pre-emption rights": R. S. U. S., sec. 2301. Having commuted under that section, it is claimed that Neuberg is entitled to all the benefits and was subjected to all the restraints and prohibitions of chapter 4 of those statutes entitled "pre-emptions." Assuming for the present that when Neuberg made the several mortgages he was under the same disabilities that he would have been had he previously pre-empted the eighty, the question recurs whether such disabilities were such as to avoid the mortgages. That chapter provides, in effect, that "any grant or conveyance which" such pre-emptor "may have made, except in the hands of *bona fide* purchasers for a valuable consideration, shall be null and void," with an exception not material here: *Id.*, sec. 2262.

But that provision did not operate as a disability, since the several mortgagees advanced their money in good faith, and the plaintiff bid in the property on the foreclosure sale, and paid thereon the amount of money stated in good faith. The same section required such pre-emptor, before being allowed to enter the lands, to take the requisite oath, among other things, to the effect that he had "not directly or indirectly made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself": R. S. U. S., sec. 2262. And that chapter further provides that "all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void": *Id.*, sec. 2263. According to the supreme court of the United States, these provisions were enacted to prevent such pre-emption rights from being acquired by land speculators: *Myers v. Croft*, 13 Wall. 291. In that case, Mr. Justice Davis, speaking for the court, said: "In view of these facts, we cannot suppose, in the absence of an express declaration to that effect, that Congress intended to tie up these lands in the hands of the original owners until the government should

choose to issue the patent. If it had been the purpose of Congress to attain the object contended for, it would have declared the lands themselves unalienable until the patent was granted. Instead of this, the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after the entry, if at that time he was in good faith the owner of the land and had done nothing inconsistent with the provisions of the law on the subject." To the same effect, *Lessee of French v. Spencer*, 21 How. 228; *Thredgill v. Pintard*, 12 Id. 24; *Landes v. Brant*, 10 Id. 348. These views are in harmony with the adjudications of this court, wherein it has been held that such pre-emptor, having made the entry, paid his money, taken his receipt or certificate, and recorded the same (as Colstad did), has the entire equitable title and interest, which he may assign, transfer, and convey at pleasure; and that the legal title will vest in his grantee upon the issuing of the patent: *Dillingham v. Fisher*, 5 Wis. 475; *Stephenson v. Wilson*, 37 Id. 489. In *Lamb v. Davenport*, 18 Wall. 307, it was held that, "unless forbidden by some positive law, contracts made by actual settlers on the public lands concerning their possessory rights, and concerning the title to be acquired in future from the United States, are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired, and though the government is under no obligation to either of the parties in regard to the title." It follows from these several adjudications that Colstad was under no disability which prevented him from conveying his equitable title and interest in the land to Neuberg, and that the latter was under no disability which prevented him from creating valid liens thereon by way of mortgages, as he did. These things being so, there can be no question but what such equitable right, title, and interest passed to the plaintiff by such foreclosure sale and sheriff's deed.

3. The plaintiff having thus acquired such equitable right, title, and interest in and to the eighty, was she divested of the same by the subsequent entry and commutation by Neuberg while in possession as her tenant? To hold that she was, would be the consummation of a gross fraud under the guise of a legal right. This being so, it should not be sanctioned by the courts, unless forced to do so by positive law or binding authority. Here it has neither. The law on the sub-

ject seems to be pretty well settled to the effect that where the owner of such equitable right, title, and interest transfers the same by way of mortgage or otherwise to a *bona fide* purchaser for a valuable consideration fully paid, and afterwards acquires the legal title by patent from the United States, such legal title at once inures to the benefit of such *bona fide* purchaser, and estops such patentee from claiming title as against such purchaser. This is sustained by the authorities already cited. This rule is well illustrated and strongly supported by *Thredgill v. Pintard*, *supra*, in which it was held that "where a settler upon the public lands had a pre-emption right to them, and sold them to a person who again sold them to a third party, the original vendor has a lien upon the land for the balance of the purchase-money still due, and can enforce it by a bill in chancery, notwithstanding the vendee has taken out a patent in his own name under a subsequent pre-emption law." So, in *Lessee of French v. Spencer*, *supra*, it was held that "a patent to the original beneficiary, who had previously sold his right, inured to the benefit of the purchaser, and related back to the date of the entry; and the heir of the grantor in such a deed is estopped from setting up a legal title under the patent." See also *Hughes v. United States*, 4 Wall. 232. In *Orr v. Stewart*, *supra*, the homesteader, after having mortgaged his right, title, and interest, and the mortgage foreclosed and bid in by the mortgagee, who obtained thereon a sheriff's deed, commuted his homestead entry into a cash entry, as here, and paid in full the price, and received a duplicate receipt and certificate of purchase therefor; but it was held that such after-acquired title by the mortgagor fed the mortgage, and inured to the benefit of the mortgagee and purchaser at such foreclosure sale.

4. Upon the principles stated, it may seem that the plaintiff had an adequate remedy at law, and hence that there was no necessity to bring this action. But the patent gave to Neuberg the apparent legal title of record; and some of the facts which make that title inure to the benefit of the plaintiff are not of record, and hence there is a necessity of establishing the plaintiff's right to the land by an adjudication.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded, with directions to enter judgment in accordance with the prayer of the complaint.

VALLEY LUMBER COMPANY v. SMITH.

[71 WISCONSIN, 304.]

CONFLICTING EVIDENCE. — WHERE TESTIMONY IS CONFLICTING AS TO THE CONTRACT PRICE AGREED UPON at oral sale, evidence is admissible to show the value of the property at the time of the sale, as tending to show the real contract.

ID. — WHERE TESTIMONY IS CONFLICTING as to the contract price, and as to whether defendant objected to an account presented, it is error to suppress defendant's evidence and charge that where no objection is made to an account rendered, it is *prima facie* evidence of its correctness.

WHERE EVIDENCE IS CONFLICTING AS TO CONTRACT PRICE, and defendant introduces in evidence a memorandum of the contract which he testifies he made at the time of its execution in a book kept for that purpose, and such evidence is unimpeached, it is error to cast doubt and suspicion upon the evidence, and to call the special attention of the jury to the criticisms of counsel upon the memorandum.

J. H. Opdale and James Wickham, for the appellants.

W. F. Bailey, for the respondent.

ORTON, J. This action is brought to recover a certain sum for goods, wares, and merchandise, and two hundred dollars for the use or lease of certain logging-camps during the winter of 1883 and 1884, situated on a certain forty acres of land belonging to the plaintiff, which had been denuded of its timber or stumpage. The only matter controverted on the trial was the claim for two hundred dollars for the use of said logging-camps. This the defendants denied in their answer. The only witness for the plaintiff on that question was one Carson, the president of the plaintiff company, who testified that the contract for the use of the logging-camps was made by him when he and Smith, one of the defendants, were alone, and that such was the contract. The defendant Smith testified with great positiveness that the defendants never made any such contract, but that the contract was that the defendants should pay the plaintiff two hundred dollars for a good title of the said forty acres of land, with the old camps thereon, which were dilapidated and of scarcely any value whatever. Another witness, who claimed to have been present when the contract was made, testified that the said Carson, the president of the company, said: "I will do better by you than by the other man. I will give you the logging-camps and the forty acres of land; the camps stand on for two hundred dollars, and give you title." Another witness testified that he

heard the said Carson substantially admit that he had sold the defendants the camps and the forty acres. The testimony tended to show that the defendants, the winter before, had been troubled by some one shutting up their roads across the said forty-acre lot, which they used in their logging business on other lands in the vicinity, and that they wished therefore to own and have full control of that lot, so as to prevent such annoyance. The said Carson, on cross-examination, testified that "Smith's object was to purchase those camps, and get the forty acres of land on which they stood, so that he might control the roads on account of this trouble"; and he further testified: "I would give him title to the forty acres of land if I had known he wanted it. It would not have been any detriment to have deeded it to him. I would not give him the title now if he paid the money. I never agreed to."

This is a sufficient statement of the case to show the pertinency of the exceptions. The jury rendered a verdict for the plaintiff of \$238.62, presumably for the \$200 for the use of the logging-camps, and interest. To reverse the judgment rendered on this verdict, the appellants allege the following errors:—

1. The appellants offered and asked questions tending to show the real value of the logging-camps at the time, and that they were useless to the plaintiff, as the timber had all been cut off the forty acres, and that they were not in a condition to use until repaired, and that they were of no value whatever for the purpose of corroborating the testimony of the defendant Smith and of the other witnesses as to what the contract was. The court sustained the objection of the plaintiff to such offer and questions. This was clearly erroneous. This was a very strong case for the application of the rule that such corroboration is proper when there is a direct conflict of the evidence as to the contract price to be paid for the property in question. If the logging-camps were of the value of two hundred dollars or more, then the plaintiff's version of the contract would be quite probable as against the testimony for the defendants that such consideration was to include the title of the forty acres also. On the other hand, if the camps were of little or no real value to any one, then the testimony of the defendants would be quite probable as against the testimony for the plaintiff that the defendants agreed to pay two hundred dollars rent for the use of such camps for one winter.

This is agreeable to common reason, and logical, and such evidence is approved by the authorities.

The evidence disapproved in *Kvammen v. Meridean Mill Co.*, 58 Wis. 399, was as "to the usual price for sawing laths the season before." It did not relate to the price or value of the thing itself, which was the subject of the controversy and of the contract. In that case, Mr. Justice Cassoday said in the opinion: "It may be, as intimated by Mr. Justice Cooley in *Campau v. Moran*, 31 Mich. 280, that where the evidence adduced upon both sides is in direct conflict, and pretty evenly balanced, as to the contract price, evidence that the cost of performance was greatly in excess or greatly below such price might afford some reasonable ground for believing that the contract was for the price nearest the cost." This is a clear exposition of the rule. Mr. Abbott, in his work on trial evidence, states the rule as follows: "Where the testimony is conflicting as to what was the price agreed upon in an oral sale, or as to whether there was any agreement as to price, it is competent to show the value of the property at the time of the sale as tending to show what the real contract was": Page 305. The following cases are cited by the appellant's counsel as supporting this rule: *Richardson v. McGoldrick*, 43 Mich. 476; *Misner v. Darling*, 44 Id. 438; *Rauch v. Scholl*, 68 Pa. St. 234; *Allison v. Horning*, 22 Ohio St. 138; *Swain v. Cheney*, 41 N. H. 232; *Moore v. Davis*, 49 Id. 45; 6 Am. Rep. 460; *Kidder v. Smith*, 34 Vt. 294; *Johnson v. Harder*, 45 Iowa, 677; *Bradbury v. Dwight*, 3 Met. 31.

2. The court, in charging the jury, after reciting the testimony of Carson, the president of the company, that he had presented to the defendants a bill or account containing this charge of two hundred dollars for the use of the camps, and that the defendants made no objections to it, but kept the bill, said to the jury: "Where a statement of account is rendered, and nothing is said about it, and no objections made, of course that is *prima facie* evidence of the correctness of the bill. . . . It is a sort of admission on his part of the correctness of the bill." Aside from the fact that this claim is not a matter of book-account, or of an account rendered or bill presented, but the subject of a special contract, and such a principle of law has no application to it, it was unfair for the court to ignore or suppress the testimony of the defendant Smith, that he did at the time object and insist that he had never hired or rented the camps, but that he had bought the

forty acres, with the camps upon it. The jury might forget that evidence, and from this charge of the court take it for granted that the defendants had assented to the claim by not objecting to it, and might have been, and probably were, thereby misled as to the evidence.

3. The defendant Smith testified that he made a memorandum of the contract of the purchase of the forty acres and the camps on it at the time in a memorandum-book which he kept for such matters of business, and said memorandum was introduced in evidence. The court, in commenting upon this evidence to the jury, and after saying "that it tended to show that he [Smith] was not mistaken as to what the contract was," said: "Of course, if he really made that memorandum," etc. "You have heard the criticisms of counsel upon that memorandum. It is your duty to consider whether that was really a memorandum made at that time." This was very unfair, as well as a very serious error.

There was no evidence tending to impeach the credibility of the defendant Smith in respect to his having made at the time this memorandum, or tending to cast any suspicion upon his evidence in that respect. The court cast suspicion and doubt upon this evidence, without any other grounds than the unrestrained and groundless criticisms of the opposing counsel in his argument. The attention of the jury is not called to the testimony on this point, except with an unauthorized proviso, "if he really made the memorandum," and "whether it was really made at that time." But the special attention of the jury is called to "the criticisms of counsel upon that memorandum."

There are other errors assigned, but they may not occur upon another trial, and are not very material. We are inclined to think that if the above errors had not been committed, the verdict would have been in favor of the defendants.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

CONTRACT OF SALE, parol evidence is admissible to prove: *Moore v. Davis*, 6 Am. Rep. 460.

McCLURE v. CAMPBELL.

[71 WISCONSIN, 350.]

ASSIGNMENT OF PROPERTY, MADE PURSUANT TO A BANKRUPT ACT, the assignee being in effect an officer of the court, and the assigned property being *in custodia legis*, and administered by and under direction of the court, has no extraterritorial effect so as to defeat an attachment levied upon property in another state, under the laws of that state, by a creditor of the assignor.

CONFLICT OF LAWS. — ASSIGNMENT BY DEBTOR HAVING PROPERTY IN BOTH WISCONSIN AND MINNESOTA, made under the insolvent law of the latter state, does not affect property of the assignor situated in Wisconsin.

ACTION to recover the proceeds of a sale of personal property seized in Wisconsin by one Campbell, as sheriff, under attachment proceedings sued out by one Johnson against property of Gillespie and Harper, partners, owning property and doing business in Minnesota and Wisconsin. By agreement, the sheriff made the sale and retained the proceeds, subject to the judgment of the court. Johnson obtained judgment against said partners, issued execution, and the sheriff levied upon said proceeds. McClure, the plaintiff, claims said proceeds under an assignment, made to him by Gillespie and Harper, in Minnesota, under the insolvent laws of that state. McClure, Johnson, and the firm of Gillespie and Harper are and were residents of the state of Minnesota when the assignment was made. The court held that plaintiff took no title to the property seized and sold in Wisconsin, and plaintiff appeals.

Fayette, Marsh, and Roy. S. Reed, for the appellant.

H. L. Humphrey, for the respondent.

LYON, J. Chapter 148 of the General Laws of Minnesota for 1881, under which the assignment in question was made, is entitled "An act to prevent debtors from giving preference to creditors, and to secure the equal distribution of the property of debtors among their creditors, and for the release of debts against debtors." The act provides that whenever the property of any debtor shall be attached or levied upon by any writ or process from a court of record of that state in favor of any creditor, or garnishment made against any debtor, such debtor may, within ten days after such levy or garnishment, "make an assignment of all his property and estate, not exempt by law, for the equal benefit of all his

creditors, in proportion to their respective valid claims, who shall file releases of their debts and claims against such debtors, as hereinafter provided." The act then provides that, upon such assignment being made, the attachments, levy, or garnishments shall be dissolved, and the officer shall deliver the property to the assignee, unless the latter elect to retain the process for the benefit of all such creditors: Sec. 1. It is further provided in section 10 that "no creditor of any insolvent debtor shall receive any benefit under the provisions of this act, or any payment of any share of the proceeds of the debtor's estate, unless he shall first have filed with the clerk of the district court, in consideration of the benefits of the provisions of this act, a release to the debtor of all claims other than such as may be paid under the provisions of this act for the benefit of such debtor; and thereupon the court or judge may direct that judgment be entered discharging such debtor from all claims or debts held by creditors who shall have filed such releases."

Within ten days before the assignment to the plaintiff was executed, the property of Gillespie and Harper in Minnesota was seized by virtue of a writ of attachment issued out of a court of record of that state.

Another statute of Minnesota (Gen. Stats., c. 41) gives the procedure for making general assignments for the benefit of creditors. Its provisions are not unlike chapter 80 of our Revised Statutes, entitled "Of Voluntary Assignments."

The contention on behalf of the plaintiff is, that the instrument under which the plaintiff claims to recover the proceeds of the property in question is essentially a voluntary assignment by Gillespie and Harper for the benefit of their creditors; and that it is a valid conveyance to the assignee of all the personal property of the assignors, wherever the same may be situated. In other words, their position is that, in respect to personal property, the *lex loci contractus* governs, and an assignment valid under the laws of the state in which it was executed is valid everywhere.

The contention on behalf of the defendant (who represents the creditor Johnson) is, that the instrument is not a voluntary assignment for the benefit of creditors, within the meaning of that term as used in the common law, or in chapter 41 of the Minnesota statute, or chapter 80 of our Revised Statutes, but is part of a statutory proceeding in insolvency, looking to a full discharge of the debts of the insolvent without full

payment thereof,—a result which cannot follow a voluntary assignment for the benefit of creditors; and further, such being the nature of the proceeding, the assignment has no effect beyond the territorial limits of the state in which it is made, and in which the assignor resides. It is also denied that it has any such extraterritorial effect, even though it be a voluntary assignment for the benefit of creditors.

The question as to the character of the instrument under which the plaintiff claims has been determined by the supreme court of Minnesota in *Jenks v. Ludden*, 34 Minn. 482, and other cases therein cited. In *Jenks v. Ludden*, *supra*, the court says: "Our act of 1881 is, as we have repeatedly held, a bankrupt act; the assignee being, in effect, an officer of the court, and the assigned property being *in custodia legis* and administered by the court or under its direction: *Wendell v. Lebon*, 30 Minn. 234; *In re Mann*, 32 Id. 60; *Lord v. Meachem*, 32 Id. 66; *Bennett v. Denny*, 33 Id. 530; *Simon v. Mann*, 33 Id. 412." Thus it will be seen that although an assignment under chapter 148 of the Statutes of Minnesota for 1881 in a certain sense is voluntary, in that the debtor is not compelled to make it,—a feature common to many, perhaps most, insolvent laws, including those of this state (R. S., c. 179),—still that court holds it to be, in substance and legal effect, an assignment by operation of the statute thus held to be a bankrupt law, executed as a part of the procedure in the administration of that law. We regard the above adjudications of the supreme court of Minnesota, giving construction to their act of 1881, as binding upon this court, and hence shall not examine or discuss the argument of counsel for the plaintiff against the accuracy of such construction. We will only say that our consideration of the subject has inclined us to think that the court construed the act correctly.

Our conclusion as to the character of the instrument in question renders it quite unnecessary to determine whether a voluntary assignment for the benefit of creditors, executed in Minnesota by a resident of that state, pursuant to chapter 41, passes to the assignee title to personal property named in such assignment having a *situs* in this state. This question was very fully argued by the respective counsel, and their citations of authorities (to which we add *Mowry v. Crocker*, 6 Wis. 326) will be preserved in the official report of the case.

The only remaining question (and it is the controlling question in the case) is, Has an assignment of property, made

pursuant to a bankrupt act, the assignee being in effect an officer of the court, and the assigned property being *in custodia legis* and administered by or under the direction of the court, any extraterritorial effect? That is to say, should the courts of this state recognize such an assignment as a valid transfer to the assignee of personal property in this state, and thus defeat an attachment levied upon it pursuant to the laws of this state by a creditor of the assignor? We think the question is not affected by the fact that the property, when seized, was in the possession of the assignee, or that the attaching creditor is a resident of the state in which the insolvency or bankruptcy proceedings were had.

The cases on this subject are very numerous. No review of them will here be attempted. While some of them may, under special circumstances, extend the rule of comity to such a case, and thus give an extraterritorial effect to somewhat similar assignments, we are satisfied that the great weight of authority is the other way. The rule in this country is, we think, that assignments by operation of law in bankruptcy or insolvency proceedings, under which debts may be compulsorily discharged without full payment thereof, can have no legal operation out of the state in which such proceedings were had. This rule is laid down in *Burrill on Assignments*, 5th ed., p. 458, sec. 303, and numerous cases are cited in the note to that section in support of it.

An application of the above rule to this case negatives the plaintiff's right to recover in the action.

By the COURT. The judgment of the circuit court is affirmed.

ASSIGNMENT UNDER STATE BANKRUPT LAWS — EXTRATERRITORIAL EFFECT OF: *Walters v. Whitlock*, 76 Am. Dec. 607, note 616; *Bryan v. Brisbin*, 72 Id. 219, and note; note to *Hanford v. Paine*, 78 Id. 594, 597, treating the topic at length; see also *Thurston v. Rosenfield*, 97 Id. 351, and note; *Bently v. Whittemore*, 97 Id. 671, and note; *Weider v. Maddox*, 59 Am. Rep. 617, and foot-note; *Moore v. Church*, 59 Id. 439. In these cases the various rulings will be found, the authorities not being harmonious. In *Smith's Appeal*, 117 Pa. St. 30, and *Coffin v. Kelling*, 83 Ky. 649, it is held that a voluntary assignment for the benefit of creditors in one state will pass title to personalty in another state.

PARKER v. HULL.

[71 WISCONSIN, 368.]

MISTAKE — DEGREE OF PROOF. — TO ESTABLISH MISTAKE, party alleging it must prove it clearly and satisfactorily, and perhaps beyond a reasonable doubt; and to charge that to establish mistake the evidence in its favor must be more weighty, convincing, or satisfactory than the evidence of the other party is error, as a mere preponderance of evidence is not sufficient.

ERRONEOUS CHARGE. — WHERE CORRECT RULE IS BRIEFLY STATED in the beginning of a charge, but is afterwards overruled and changed, and an incorrect rule substituted and impressed upon the jury, so as to probably influence it, the whole charge is error.

John Barker, for the appellant.

G. Stevens, for the respondent.

ORTON, J. This action is brought to recover the sum of \$283, the balance due upon a certain \$800 note given by the respondent to the appellant in part for the purchase of one third interest in a grist or roller mill, in the city of Baraboo. The defendant claims that there was a mistake made at the time, in calculating the amount that should be put into said note, by not deducting from said amount of \$800 the sum of \$283 for certain profits that the mill had made, which at that time were not estimated or ascertained, but were contemplated by the agreement of the parties. The jury found that such mistake was made, and therefore found for the defendant.

1. The appellant claims that the verdict is against the law and the evidence. We think that the evidence tended to prove that there was a mutual mistake of fact in determining the amount that should be put into the note, as claimed by the respondent, and that there was sufficient evidence to preclude our interference with the verdict on that ground.

2. The contention of the learned counsel of the appellant is, that the learned judge before whom this cause was tried erroneously instructed the jury as to the degree or quantum of evidence necessary to establish the alleged mistake. At the request of the appellant's counsel, the jury were first instructed that, "in order to establish a mistake, the proof thereof must be clear, satisfactory, and convincing." This was strictly correct. But this brief statement of an abstract legal principle, disconnected from any other part of the instructions, and made before the main and general instructions were in form addressed to the jury, would not be likely to make

a very strong or lasting impression upon their minds. The following instruction was the last one given, and upon the declared subject of the "burden of proof," and would be likely to be intently listened to and well remembered, as the correct rule by which the testimony on behalf of the defendant should be measured. This, as the true rule, is stated deliberately, impressively, and at considerable length, and made specially applicable to the facts of the case, and it was illustrated and explained so that the jury must have clearly understood it. The instruction was as follows: "The burden of proof is upon the defendant to establish the fact that such a mistake as he claims was in fact made, and that this note was given for \$283 more than it should have been by virtue of the terms of the contract between the plaintiff and the defendant. By burden of proof is simply meant this: When a party avers a thing which is denied by his opponent, we say the party who avers the fact to exist must take upon himself the trouble or burden of proving it; and when the burden of proof is upon a party, he is bound to establish the fact which he alleges, and the other party denies, by a preponderance of the evidence; and by a preponderance of the evidence is simply meant that the evidence which the party produces in favor of the fact which he affirmatively avers, and which is denied by his opponent, must be more weighty, convincing, and satisfactory than the proof adduced by the other party by way of answer or by way of overcoming such affirmative proof." The jury then retired with this rule fresh in memory.

It was incumbent upon the defendant to correct and surcharge an account, to reform a written instrument, or to establish a mistake. The rule recognized by all courts in such cases is, that the party alleging the mistake must prove it clearly and satisfactorily, and, some courts hold, beyond a reasonable doubt. A mere preponderance of evidence is not sufficient. To be more weighty, convincing, or satisfactory than the evidence of the other party is not the rule; for that would be simply the rule of preponderance: *Abbott's Trial Evidence*, 463; *Towsley v. Denison*, 45 Barb. 490; *Klauber v. Wright*, 52 Wis. 303; *Wells v. Ogden*, 30 Id. 637; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Ely v. Early*, 94 N. C. 1. In *Bond v. Dorsey*, 65 Md. 310, the language is, that the evidence must be "clear and overwhelming"; citing *Groff v. Rohrer*, 35 Id. 327; *Mendenhall v. Steckel*, 47 Id. 454; 28 Am. Rep. 481; *Beard v. Hubble*, 9 Gill, 430. The learned counsel of the re-

spondent virtually admits in his brief that such is the rule, but contends that such rule was given in the first place, and the whole charge must be taken together. The trouble is, that the correct rule, so briefly stated in the beginning, was afterwards overruled and changed, and the incorrect rule, of a mere preponderance of the evidence, substituted and impressed upon the jury, and they were quite probably influenced by it. Which rule should they regard,—the first or the last? To say the least of it, the evidence to establish the mistake was not of the clearest or most convincing character or beyond a reasonable doubt. On account of this error in the charge, the judgment will have to be reversed.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

EVIDENCE TO JUSTIFY RELIEF on the ground of mistake must be clear, unequivocal, and decisive: *Allen v. Elder*, 2 Am. St. Rep. 63; *Hutchinson v. Ainsworth*, 2 Id. 823, and note 828.

INCONSISTENT, CONFLICTING, OR MISLEADING INSTRUCTIONS ARE ERRONEOUS: *Horne v. State*, 81 Am. Dec. 499, note 503; *Adams v. Capron*, 83 Id. 566; *Southern R. R. Co. v. Kendrick*, 90 Id. 332; *State v. Benham*, 92 Id. 416; *Thompson v. Thompson*, 98 Id. 638, and notes to these cases.

AYRES v. CHICAGO AND NORTHWESTERN R'y Co.

[71 WISCONSIN, 372.]

COMMON CARRIER OF LIVE-STOCK, WHAT CONSTITUTES.—Railroad company engaged in transporting live-stock over its road, and accustomed to furnish suitable cars therefor, upon reasonable notice, whenever within its power to do so, and holding itself out to the public as such carrier for hire upon the terms and conditions prescribed in the written contracts with shippers, is a common carrier of live-stock, with such restrictions and limitations of its common-law liability as arise from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals under such contracts of carriage.

COMMON CARRIER OF LIVE-STOCK FOR HIRE, holding itself out to the public as such, under the restrictions and limitations named in its contracts with shippers, is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence, without jeopardizing its other business as such common carrier.

BURDEN OF PROOF IS UPON COMMON CARRIER OF LIVE-STOCK to show that it could not, with reasonable diligence and without jeopardizing its other business, have furnished cars for the transportation of such stock at the time ordered and upon the notice given.

COMMON CARRIER OWES SAME DUTY RELATIVELY to all shippers at stations of the same business importance as to supplying cars, and no station,

much less any one shipper, has the right to command the entire resources of the carrier to the exclusion of other stations and shippers, but the cars must be so distributed at the different stations as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity.

COMMON CARRIERS OF LIVE-STOCK — DUTY TO FURNISH CARS ON NOTICE.

— Where a shipper applies to a carrier of live-stock for cars to be furnished at a time and station named, the carrier must inform the shipper within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying thereon, is present with his live-stock at such time and place, and finds no cars, the carrier is liable in damages.

DAMAGES AGAINST COMMON CARRIER OF LIVE-STOCK for delay in transportation is limited to the expense of keeping, shrinkage, and depreciation in value of the stock during such delay.

DAMAGES for delay in transporting live-stock. From the special verdict, it appears that the defendant railroad company was a common carrier of live-stock; that plaintiff notified defendant's agents at La Valle and Reedsburg, two stations on the line of its road, that he would require seven cars on October 17, 1882, for the transportation of live-stock to Chicago. Such notice was given on October 13, 1882, was reasonable, and stated that four cars would be loaded at La Valle, and three cars would be loaded at Reedsburg. Defendant's agents promised to order said cars, and have them in readiness at the time and places named. Two cars were furnished at Reedsburg on October 17, and one on October 19, 1882. Four cars were furnished at La Valle on October 19, 1882. Two cars were furnished as soon as possible, but the other five were not. Plaintiff had no notice before October 17, 1882, that all the cars would not be furnished as ordered, and he was at the respective stations mentioned at the date named with sufficient live-stock to load all the cars. The jury returned a verdict for \$825.97 damages in favor of plaintiff, for depreciation in value, care, and feeding, and shrinkage on the stock, caused by the delay in their transportation. Judgment was entered accordingly, and defendant appealed. Other facts are stated in the opinion.

J. G. Jenkins, and Winkler and Smith, for the appellant.

G. Stevens, for the respondents.

CASSODAY, J. There is no finding of any agreement on the part of the defendant to have the cars in readiness at the stations on Tuesday morning, October 17, 1882. There is no

testimony to support such a finding. One of the plaintiffs testified, in effect, that he told the agent that he would want the cars on the morning of the day named; that the agent took down the order, put it on his book, and said: "All right," he would try and get them, but that they were short because they were then using more cars for other purposes; that nothing more was said. It appears in the case that the cars were in fact furnished. It also appears that, as the shipments were made, special written contracts therefor were entered into between the parties, whereby it was, in effect, agreed and understood that the plaintiffs should load, feed, water, and take care of such stock at their own expense and risk, and that they would assume all risk of injury or damage that the animals might do to themselves or each other, or which might arise by delay of trains; that the defendants should not be liable for loss by jumping from the cars or delay of trains not caused by the defendant's negligence. The court, in effect, charged the jury that there was no evidence of any negligence on the part of the defendant causing delay in any train after shipment, and hence that the delay of the two cars admitted to have been furnished in time was not before them for consideration. This relieves the case from all liability on contract. It also narrows the case to the defendant's liability for the delay of two days in furnishing the five cars at the stations named, as ordered by the plaintiffs, and in the absence of any contract to do so.

In *Richardson v. Chicago etc. R'y Co.*, 61 Wis. 601, 18 Am. & Eng. R. R. Cas. 530, it was, in effect, held competent for a railroad company engaged in the business of transporting live-stock to exempt itself by express contract "from damage caused wholly or perhaps in part by the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals." And it was then said: "Since the action is not based upon contract, the plaintiff must recover, if at all, by reason of the defendant's liability as a common carrier upon mere notice to furnish cars, and a readiness to ship at the time notified. Did such notice and readiness to ship create such liability? We have seen that a carrier of live-stock may, to at least a certain extent, limit its liability. Whether the defendant was accustomed to so limit its liability, or to carry all live-stock tendered upon notice, without restriction, does not appear from the record. If it was accustomed to so limit, and the limitation was legal, it should at least have been so al-

leged, together with an offer to comply with the customary restriction. If it was accustomed to carry all live-stock offered upon notice and tender, and without restriction, then it would be difficult to see upon what ground it could discriminate against the plaintiff by refusing to do for him what it was constantly in the habit of doing for others."

In that case, there was a failure to allege any such custom or holding out on the part of the defendant, or that reasonable notice had been given to the defendant to furnish suitable cars to the person applying therefor, or that the same was within its power to do so; and hence the demurrer was sustained. The allegations thus wanting in that case are present in this complaint. It is, moreover, in effect admitted that the defendant was at times, when able to do so, engaged in the transportation of live-stock over its roads, one line of which runs through the stations in question; that it was accustomed to furnish suitable cars therefor, upon reasonable notice, when within its power to do so; and to receive, transport, and deliver such live-stock with reasonable dispatch, but only upon special contracts at the time entered into between the shipper and the defendant, and upon such terms and conditions as should be agreed upon in writing. It is, moreover, manifest that the defendant actually undertook to furnish the cars at the time designated by the plaintiffs; that it succeeded in furnishing two of them on time; that there was a delay of two days in furnishing the other five; and that the plaintiffs were willing to and did submit to the terms and conditions of carriage imposed by the defendant by signing the special written contracts mentioned. It must be assumed, also, that such special written contracts were substantially the same as all contracts made by the defendant at that season of the year for the shipment of similar live-stock under similar circumstances. Otherwise the defendant would be justly chargeable with unlawful discrimination; the right to do which the learned counsel for the defendant frankly disclaimed upon the argument.

We are therefore forced to the conclusion that, at the time the plaintiffs applied for the cars, the defendant was engaged in the business of transporting live-stock over its roads, including the line in question, and that it was accustomed to furnish suitable cars therefor, upon reasonable notice, whenever it was within its power to do so; and that it held itself out to the public generally as such carrier for hire, upon such

terms and conditions as were prescribed in the written contracts mentioned. These things, in our judgment, made the defendant a common carrier of live-stock, with such restrictions and limitations of its common-law duties and liabilities as arose from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals, under the contracts of carriage. This proposition is fairly deducible from what was said in *Richardson v. Chicago etc. R'y Co.*, *supra*, and is supported by the logic of numerous cases: *North Pennsylvania R. R. Co. v. Commercial Bank*, 123 U. S. 727; *Moulton v. St. Paul etc. R. R. Co.*, 31 Minn. 85; 12 Am. & Eng. R. R. Cas. 13; *Lindsley v. Chicago etc. R. R. Co.*, 36 Minn. 539; *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142; *Kimball v. Rutland etc. R. R. Co.*, 26 Vt. 247; 62 Am. Dec. 567; *Rixford v. Smith*, 52 N. H. 355; *Clarke v. Rochester etc. R. R. Co.*, 14 N. Y. 570; 67 Am. Dec. 205; *South & N. A. R. R. Co. v. Henlein*, 52 Ala. 606; *Baker v. L. & N. R. R. Co.*, 10 Lea, 304; 16 Am. & Eng. R. R. Cas. 149; *Philadelphia etc. R. R. Co. v. Lehman*, 56 Md. 209; *McFadden v. M. P. R. R. Co.*, 92 Mo. 343; 3 Am. & Eng. Cyclop. Law, 1-10, and cases there cited. This is in harmony with the statement of Parke, B., in the case cited by counsel for the defendant, that "at common law a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession": *Johnson v. Midland R. R. Co.*, 4 Ex. 372. Being a common carrier of live-stock for hire, with the restrictions and limitations named, and holding itself out to the public as such, the defendant is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence without jeopardizing its other business as such common carrier: *Texas etc. R. R. Co. v. Nicholson*, 61 Tex. 491; *Chicago etc. R. R. Co. v. Erickson*, 91 Ill. 613; *Ballentine v. N. M. R. R. Co.*, 40 Mo. 491; *Guinn v. W., St. L., & P. R. R. Co.*, 30 Mo. App. 453.

Whether the defendant could with such diligence so furnish upon the notice given, was necessarily a question of fact to be determined. The plaintiffs, as such shippers, had the right to command the defendant to furnish such cars. But they had no right to insist upon or expect compliance, except upon giving reasonable notice of the time when they would be required. To be reasonable, such notice must have been sufficient to enable the defendant, with reasonable diligence under the circumstances then existing, to furnish the cars without inter-

fering with previous orders from other shippers at the same station, or jeopardizing its business on other portions of its road.

It must be remembered that the defendant has many lines of railroad scattered through several different states. Along each and all of these different lines it has stations of more or less importance. The company owes the same duty to shippers at any one station as it does to the shippers at any other station of the same business importance. The rights of all shippers applying for such cars under the same circumstances are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along and upon such different lines of railroad, loaded or unloaded. Many will necessarily be at the larger centers of trade. The conditions of the market are not always the same, but are liable to fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines, and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. The requirement of such fair and general distribution and uniform vigilance is not only mutually beneficial to producers, shippers, carriers, and purchasers, but of business and trade generally. It is the extent of such business ordinarily done on a particular line, or at a particular station, which properly measures the carrier's obligation to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance. These views are in harmony with the adjudications last cited.

The important question is, whether the burden was upon the plaintiffs to prove that the defendant might, with such reasonable diligence, and without thus jeopardizing its other business, have furnished such cars at the time ordered and upon the notice given; or whether such burden was upon the defendant to prove its inability to do so. We find no direct adjudication upon the question. Ordinarily, a plaintiff alleging a fact has the burden of proving it. This rule has been applied by this court, even where the complaint alleges a

negative, if it is susceptible of proof by the plaintiff: *Hepler v. State*, 58 Wis. 46. But it has been held otherwise where the only proof is peculiarly within the control of the defendant: *Mecklem v. Blake*, 16 Id. 102; *Beckmann v. Henn*, 17 Id. 412; *Noonan v. Hsley*, 21 Id. 144; *Great Western R. R. Co. v. Bacon*, 30 Ill. 352; *Brown v. Brown*, 30 La. Ann. 511. Here it may have been possible for the plaintiffs to have proved that there were, at the times and stations named, or in the vicinity, empty cars, or cars which had reached their destination, and might have been emptied with reasonable diligence, but they could not know or prove, except by agents of the defendant, that any of such cars were not subject to prior orders or superior obligations. The ability of the defendant to so furnish with ordinary diligence upon the notice given, upon the principles stated, was, as we think, peculiarly within the knowledge of the defendant and its agents, and hence the burden was upon it to prove its inability to do so. Where a shipper applies to the proper agency of a railroad company engaged in the business of such common carrier of live-stock for such cars to be furnished at a time and station named, it becomes the duty of the company to inform the shipper within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying upon such conduct of the carrier, is present with his live-stock at the time and place named, and finds no cars, there would seem to be no good reason why the company should not respond in damages. Of course, these observations do not involve the question whether a railroad company may not refrain from engaging in such business as a common carrier; nor whether, having so engaged, it may not discontinue the same.

The court very properly charged the jury, in effect, that if all the cars had been furnished on time, as the two were, it was reasonable to presume, in the absence of any proof of actionable negligence on the part of the defendant, that they would have reached Chicago at the same time the two did, to wit, Thursday, October 19, 1882, A. M., whereas they did not arrive until Friday evening. This was in time, however, for the market in Chicago on Saturday, October 21, 1882. This necessarily limited the recovery to the expense of keeping, the shrinkage, and depreciation in value from Thursday until Saturday: *Chicago etc. R. R. Co. v. Erickson*, 91 Ill. 613. The

trial court, however, refused to so limit the recovery, but left the jury at liberty to include such damages down to Monday, October 23, 1882. For this manifest error, and because there seems to have been a mistrial in some other respects, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

By the COURT. Ordered accordingly.

COMMON CARRIER OF ANIMALS, liabilities of, generally: *Gulf etc. R'y Co. v. Trawick*, 2 Am. St. Rep. 494, and note 500, where it is held that such carriers must receive animals as carriers are bound to receive other property; and see note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 210-217, where this topic is fully treated.

CARRIERS OF LIVE-STOCK are bound to furnish suitable cars at proper times: *Peters v. New Orleans etc. R. R. Co.*, 79 Am. Dec. 578; *Smith v. New Haven R. R. Co.*, 90 Id. 166; note to *Clarke v. Rochester etc. R. R. Co.*, 67 Id. 211-215.

COMMON CARRIER OF LIVE-STOCK is bound to transport it within a reasonable time, and is liable for all the ordinary and proximate consequences of delay in transportation: *Ballentine v. North Missouri R. R. Co.*, 93 Am. Dec. 315, and note; note to *Clarke v. Rochester etc. R. R. Co.*, 67 Id. 213.

DUTIES OF COMMON CARRIER TO FURNISH FACILITIES for transportation at stations: See *Ballentine v. North Missouri R. R. Co.*, 93 Am. Dec. 315, and note 321, where it is held that a carrier's means of transportation must be so distributed along the road as to afford a reasonable amount of accommodation for all who may apply. Common carrier cannot give preferences to shippers: See same case, and *Messenger v. Pennsylvania R. R. Co.*, 18 Am. Rep. 754.

OSHKOSH GAS LIGHT COMPANY v. GERMANIA FIRE INSURANCE COMPANY.

[71 WISCONSIN, 454.]

INSURANCE. — WHERE CONCURRENT POLICIES of insurance on property afterwards destroyed were written with the consent of the respective companies, the aggregate amount of such insurance written in the policies is the value of the property as stipulated in each policy, and must be regarded as conclusive, not only as to the true value of the property when insured, but also as to the true amount of loss and measure of damages when destroyed, under the provisions of the Wisconsin statute, which must be regarded as part of the contract of insurance.

ID. — WAIVER OF FORFEITURE. — Where agent of insurance company, with knowledge of the forfeiture of a policy, and without insisting upon the same, continues to recognize the validity of the policy, and enters into negotiations for the settlement of a loss, whereby the insured incurs expense and trouble, this constitutes a waiver of the forfeiture.

ADMISSION OF INADMISSIBLE DECLARATION, which does not effect any substantial right of defendant, is not ground for reversal.

Jenkins, Winkler, Fish and Smith, and C. H. Van Alstine, for the appellant.

Finch and Barber, for the respondents.

CASSODAY, J. 1. Upon the verdict of the jury it must be assumed that the building mentioned was wholly destroyed by the fire. At the time of such destruction it was insured in seven different companies, in the aggregate two thousand seven hundred dollars, one fifteenth of which was in the defendant company. The evidence tended to show that the value of the building at the time of the fire was about twelve hundred dollars. The defendant concedes that, if it is liable at all, it should pay its proportionate share of the true value of the building, but insists that it is not bound to pay the amount specified in the policy. The contract of insurance was made under a statute which declared that "whenever any policy of insurance shall be written to insure any real property, and the property insured shall be wholly destroyed without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed": R. S., sec. 1943. Under this statute, it is settled by frequent adjudications that the actual value of such real estate when insured or destroyed, and the consequent actual loss to the insured, is wholly immaterial: *Reilly v. Franklin Ins. Co.*, 43 Wis. 449; 28 Am. Rep. 552; *Thompson v. Citizens' Ins. Co.*, 45 Wis. 388; *Cayon v. Dwelling House Ins. Co.*, 68 Id. 515, 516. This is the necessary result of the language of the statute making "the amount of the insurance written in such policy" conclusive between the parties to the contract, not only as to "the true value of the property when insured," but also as to "the true amount of loss and measure of damages when destroyed."

The statute must be regarded as a part of the contract of insurance, and the amount written in the policy as liquidated damages agreed upon by the parties conclusively in such contract. The several concurrent policies were each written with the consent of the respective companies. This being so, the aggregate amount of such insurance written in the several policies is the value of such property as stipulated in each contract, and hence, as between the parties, must be regarded as conclusive, not only as to "the true value of the property

when insured," but also as to "the true amount of loss and measure of damages when destroyed." This must be so, or the statute would be wholly ineffectual whenever there is more than one policy on the same property. And this is so notwithstanding other clauses in the policies inconsistent therewith. The result is, that the exceptions to such portions of the charge as, in effect, directed the jury that in case they found the building to have been wholly destroyed, then the plaintiffs were entitled to recover the full amount written in the policy, must be overruled.

2. The policy contained a clause to the effect that any increase of hazard by reason of any change in the use or occupancy of the building, or by the erection of neighboring buildings, without being specifically agreed upon, should avoid the policy. It appears that after the contract of insurance and before the fire, the plaintiffs, without the consent of the defendant, erected another building within twenty feet of the one in question, and put a steam-boiler therein of about seventy horse-power, and used the same for making steam and running an electric-light plant. There was evidence tending to show that, after the fire and proofs of loss had been furnished to the defendant, an adjuster, having knowledge of the erection of such other building and the putting in of such boiler and use of the same, and with authority from the defendant, negotiated with the agent of the plaintiffs respecting the adjustment and settlement of such loss under the policy, whereby the plaintiffs incurred expense and trouble. Under these circumstances, we think there was no error in charging the jury, in effect, that if they found that such adjuster was the agent of the defendant, and, with knowledge of such forfeiture and without insisting upon the same, continued to recognize the validity of the policy, and entered into negotiations for and efforts at a settlement of such loss, whereby the plaintiffs incurred expense or trouble, then there was a waiver of such forfeiture. Such waivers have so frequently been sanctioned by this court as to require no discussion, much less a restatement of the law: *Webster v. Phoenix Ins. Co.*, 36 Wis. 67; 17 Am. Rep. 479; *Northwestern Mut. L. Ins. Co. v. Germania F. Ins. Co.*, 40 Wis. 446; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Id. 108; 28 Am. Rep. 535; *Cannon v. Home Ins. Co.*, 53 Wis. 585; *Hollis v. State Ins. Co.*, 65 Iowa, 454.

3. Assuming that the declarations of the adjuster were not admissible to prove his authority from the defendant, yet, as

his testimony established such authority, their admission affected no substantial right of the defendant, and hence is not ground for reversal: R. S., sec. 2829.

By the COURT. The judgment of the county court is affirmed.

IN CASE OF TWO OR MORE insurances on the same property, by agreement, all the policies are considered as one, and the insurers are liable *pro rata*, and are entitled to contribution to equalize payments in case of loss: *Sloat v. Royal Ins. Co.*, 88 Am. Dec. 477, note 482.

WAIVER OF FORFEITURE OF POLICY of insurance occurs when the company, or its agent, knowing of the breach of condition which works the forfeiture, still recognizes the validity of the policy and leads the assured to still regard himself as protected thereby: *Viele v. Germania Ins. Co.*, 96 Am. Dec. 83, and note 111; *Webster v. Phoenix Ins. Co.*, 17 Am. Rep. 479.

ADMISSION OF IMPROPER EVIDENCE is not ground for reversal, unless injurious to the party objecting: *Latterett v. Cook*, 63 Am. Dec. 428; *Barton v. Kane*, 84 Id. 728; *Kisling v. Shaw*, 91 Id. 644; *Moon v. Rollins*, 95 Id. 181, and notes to these cases.

BERLIN MACHINE WORKS v. PERRY.

[71 WISCONSIN, 495.]

CONTRACT VOID AS AGAINST PUBLIC POLICY. — Contract by patentee, not to “manufacture, sell, or cause to be sold any sand-papering machines of any description,” is general and unrestricted, and where not limited or qualified by time, place, or circumstance, is unreasonable and void as against public policy; for though it affects only a single class of machines, still it is not incidental to the sale of the patent, nor necessary as a lawful protection of manufacturing or selling thereinunder.

CONTRACT BY PATENTEE not to “manufacture, sell, or cause to be sold any sand-papering machines of any description,” is general and unrestricted, and not limited to the state where the contract is made.

INJUNCTION to restrain defendant from manufacturing, selling, or causing to be sold sand-papering machines, under the covenant mentioned in the opinion. Defendant and one Mather were partners in the manufacture and sale of such machines, of which defendant, solely or jointly with others, was the inventor and owner of letters patent. He sold all his interest and the good-will in the business to Mather, and covenanted thereafter not to “manufacture, sell, or cause to be sold any sand-papering machines of any description,” unless with the consent of Mather. The plaintiff has acquired the whole interest in the business, and is now carrying it on under the letters patent granted to defendant. This appeal is taken

from an order sustaining a demurrer to the complaint. Other facts are stated in the opinion.

Erwin and Benedict, and Joshua Stark, for the appellant.

Hall and Skinner, and Gregory, Bird, and Gregory, for the respondent.

LYON, J. The only object of this action is to obtain an injunction perpetually restraining James L. Perry, the defendant, "from manufacturing, selling, or causing to be sold sand-papering machines of any description," which he covenanted with Charles A. Mather not to do, but which he has done and threatens to continue to do, contrary to the terms of such covenant. Counsel for defendant maintain that the covenant is not assignable, and hence that no one but Mather can have an action for the breach of it. We do not determine the question, but assume, for the purposes of the case, that the plaintiff corporation may maintain an action for such breach, just as Mather could have done had he not assigned his interest in the covenant.

Thus assuming the assignability of the covenant, the only question to be determined is, whether it is binding upon the defendant. That is to say, is it a covenant which it was competent for the defendant to make? or is it invalid as against public policy? The covenant is general and unrestricted. It binds the defendant, unless Mather consent in writing that he may do so, not to "manufacture, sell, or cause to be sold any sand-papering machines of any description." The prohibition is not qualified or limited by time, place, or circumstance. It is as general and comprehensive as can be expressed by language. It has no relation to the sale of a business secret, or any infringement of a trade-mark or patent.

The law undoubtedly is, that the covenant under consideration, *prima facie* at least, is void, and will be so held on demurrer, unless the party asserting its validity has averred facts in his complaint from which the court can say the restriction is not larger than is reasonably necessary for the protection of Mather in the enjoyment of the business and patents he purchased of the defendant. If it extends beyond that, it is unreasonable, and the covenant is void. In view of the averments of the complaint, we think the restriction does extend far beyond that limit. It would be a breach of the covenant were the defendant to manufacture, sell, or cause to be sold, any kind of sand-papering machines in Canada or Mexico,

or at any point in the eastern hemisphere, although the complaint shows that the plaintiff's business, assigned to it by Mather, is confined to the United States. Again, should the plaintiff abandon its business, and should the manufacture and sale of machines under the patents thus sold by defendant to Mather cease entirely, it would still be a breach of the covenant were the defendant to manufacture and sell a sand-papering machine in any place, although it did not infringe any of such patents. Furthermore, the covenant does not limit the prohibition to such machines as would or might come in competition with Mather's business. The defendant might be able to invent a sand-papering machine applicable to uses to which those made by Mather and the plaintiff were not adapted. What reason can there be for restricting him from doing so, if he is not in competition with the business he sold to Mather? We perceive none.

But it is claimed that this case is not within the above rule, for several reasons. These will now be considered.

1. An argument is predicated upon the averment in the complaint that the defendant is a carpenter and joiner, and had formerly worked at that trade. It is claimed that no restraint he might impose upon himself in respect to any other business or employment could be unlawful. There is no such rule of law. Besides, the complaint shows that he is also an inventor of sand-papering machines. The law would protect him against illegal restrictions in respect to the latter business just as readily as it would against such restrictions affecting his business as a carpenter and joiner, and on the same principles. The point is scarcely worthy of notice.

2. It is also urged that there is nothing in the covenant in question which interferes with the right of the defendant to invent other sand-papering machines, not infringing the patents sold to Mather, and to sell the inventions. It is said that such purchaser might manufacture and sell the after-invented machines without working thereby a breach of the covenant. It seems to us that this would be a very dangerous concession for the plaintiff to make were the covenant valid. It points out an easy way to make the covenant worthless. But we think the concession improvidently made. We are quite clear that if the defendant invents a machine for which he obtains letters patent, and sells the patent to one who makes and sells machines under it, the defendant thereby causes the machine to be sold, within the meaning of his covenant with Mather.

3. Neither is the position tenable that the courts of this state will consider the restriction as applicable only to Wisconsin. Were the covenant valid, our courts would take cognizance of a breach thereof committed in any other state or country the same as though committed in this state.

4. An alleged rule to the effect that restrictions of the character under consideration, if made as incidental to the sale of patents and a business thereunder, are valid, no matter how general and unlimited such restrictions may be, is invoked to uphold this covenant. But the cases cited to sustain such a rule do not sustain it as broadly as claimed. They hold that such restriction is valid only when, in the judgment of the court, it is not unreasonable, due regard being had to the subject-matter of the covenant. Tested by that rule, we have seen that the restriction in this case is not a reasonable one, because not necessary to the protection of the covenantee. In other words, this restriction is not, in any correct sense of the term, incidental to the sale of patents and a business thereunder, but reaches far beyond the point of just and lawful protection to such business.

5. It is also urged that because the restriction affects only a single class of machines, and does not cover the trade of a machinist, it is not within the rule which vitiates contracts in restraint of trade. The position cannot be sustained. While the restriction relates only to sand-papering machines, the defendant is an inventor of such machines, and the covenant unreasonably and unnecessarily prohibits him from pursuing his trade or profession. It is, therefore, within the rule that such covenants are void.

We do not feel called upon to go into a discussion of the history of the law concerning contracts in restraint of trade, or the grounds upon which the rules above stated are founded. It would be an agreeable task to elaborate these subjects, did the exigencies of the case require it. This has been well done, however, in a late treatise of much merit: Greenhood on Public Policy, pt. 14, c. 6. The author has there cited and collated practically all the cases in England and this country on the subject of contracts in restraint of trade. These cases are very numerous. The most of the materials for the very elaborate and able briefs of the respective counsel seem to have been drawn from this treatise. We have deemed it unnecessary to cite cases to each rule laid down in this opinion, believing it sufficient to refer to Mr. Greenhood's work, where

the cases will be found intelligently classified and arranged under proper heads.

By the COURT. The order sustaining the demurrer to the complaint is affirmed.

CONTRACT IN RESTRAINT OF TRADE is unreasonable and void if the restriction is limited neither to time nor space: *Keeler v. Taylor*, 91 Am. Dec. 221, and note; *Wright v. Ryder*, 95 Id. 186, and note 193; or where the restriction is larger than is required for the protection of the party with whom the contract is made: *Beard v. Dennis*, 63 Id. 380, and note; *Long v. Towl*, 97 Id. 355, and note. On this subject, see also *Diamond Match Co. v. Roeber*, 60 Am. Rep. 464; *Wiley v. Baumgardner*, 49 Id. 427; *Chicago etc. Co. v. People's etc. Co.*, 2 Am. St. Rep. 124, and note 135.

ROUNDY v. CONVERSE.

[71 WISCONSIN, 524.]

CHATTEL MORTGAGE WHICH AUTHORIZES THE MORTGAGOR to sell the goods and replace them with others to be paid for out of the proceeds of such sales, there being no agreement that the mortgagor might dispose of the proceeds of sales of the mortgaged property for his own use and benefit, is valid, though the attempt to extend the security of the mortgage over after-acquired goods is unavailing, except, perhaps, as a license to seize the goods.

EXEMPTIONS. — WHERE MORTGAGOR WHEN EXECUTING A CHATTEL MORTGAGE does not enumerate or reserve the exemption provided by section 2982, subdivision 8, of the Revised Statutes of Wisconsin, nor claim it while the property is in the hands of the mortgagee, he loses all right, after the property is sold under the mortgage, to claim the amount of such exemption in the proceeds of the sale.

ON December 23, 1886, defendant executed a chattel mortgage to Hannah B. Hamilton, which recited that it mortgaged "all my stock of goods, including the stock of goods in the store kept by me in the Hamilton store in Milton, including fixtures in store, and goods in store now, and those purchased to replace any which may be sold out." The mortgage also contained a clause authorizing the mortgagee to take possession of the mortgaged property at any time she deemed herself insecure, and to sell the same. On March 3, 1887, an attachment was sued out against defendant, and was about to be levied on the goods, when the mortgagee notified the officer, and claimed the goods by virtue of her mortgage, whereupon the possession of the store and goods was yielded to the mortgagee, and all proceedings under the attachment ceased, and the writ was never returned. The plaintiffs were the

attaching creditors, and they afterwards commenced this garnishee proceeding against the mortgagee. The mortgage was duly foreclosed, and the goods sold. Garnishee process was served on the mortgagee, before this action was brought, by another creditor of the mortgagor, and in that action she was charged as garnishee by judgment to the amount of \$160.88. Plaintiffs recovered judgment against defendant, and the present action was tried July 1, 1887. Defendant appeared for the first time, and claimed the amount provided by statute as exempt from execution. This the court allowed him, and allowed the mortgagee the amount of her unpaid mortgage against him, and also the amount with which she was charged as garnishee. The mortgage was held to be a valid security. The plaintiffs appealed.

Fethers, Jeffris, and Smith, for the appellants.

Winans and Hyzer, for the respondent.

LYON, J. Two questions were litigated on the trial. These are,—1. Is the mortgage of December 23, 1886, a valid security? and if so, 2. Should Converse have been allowed any exemptions?

1. There is nothing upon the face of the mortgage in question to impeach its validity, although the fair inference from its terms is, that the mortgagor was authorized to sell the goods and replace them with others to be paid for out of the proceeds of such sales. Probably the attempt to extend the security of the mortgage over after-acquired goods was unavailing, except, perhaps, as a license to seize such goods. This clause does not affect the validity of the security. Such is the purport and effect of the opinion by Ryan, C. J., in *Hunter v. Bosworth*, 43 Wis. 583, and of the cases there cited.

A persistent effort was made upon the trial to show that, at the time of the execution of the mortgage, there was some agreement or understanding between the parties thereto that the mortgagor might dispose of the proceeds of sales of the mortgaged property for his own use and benefit, thus bringing the case within the rule of *Anderson v. Patterson*, 64 Wis. 557. A careful examination of the testimony satisfies us that the plaintiffs failed to establish this proposition, and failed also, we think, to show that the mortgage was tainted with fraud. The circuit court so held, thus establishing the validity of the

mortgage. The ruling cannot be disturbed. We hold, therefore, that the mortgage was a valid security.

2. The ruling of the circuit court allowing Converse two hundred dollars out of the proceeds of the sale of the mortgaged property, as and for his exemptions, cannot be upheld. He made no reservation of exemptions in his mortgage to Mrs. Hamilton, and claimed none when she sold the property. Conceding that he was entitled to exemptions had he claimed the same while the property remained in the hands of Mrs. Hamilton (which is, to say the least, quite doubtful), he certainly lost all right thereto after the property was sold, and the proceeds thereof in the hands of Mrs. Hamilton attached by the plaintiffs. The exemption is of the specific property enumerated in the statute; that is to say, of two hundred dollars' worth of the goods constituting the stock in trade, and does not extend to the proceeds thereof: R. S., sec. 2982, subd.

8. In this respect the case is unlike one which involves the proceeds of money arising from insurance upon exempt property destroyed by fire (subd. 17), or money arising from the sale of a homestead (sec. 2983). Such moneys are specially exempted by the statutes. We are aware of no provision of law which extends the exemption of stock in trade to the proceeds of such stock realized upon a sale thereof. It was error, therefore, to allow any exemptions to Converse out of the moneys in the hands of Mrs. Hamilton. The result is, that the plaintiffs' judgment against the garnishee should be increased two hundred dollars.

It appeared that Mrs. Hamilton took, under the mortgage, goods of the value of \$133 not covered by it. The circumstance is immaterial, because the plaintiffs recover of Mrs. Hamilton more than the value of such goods.

By the COURT. The judgment is reversed, and the cause remanded, with directions to the circuit court to render judgment for the plaintiffs in accordance with this opinion.

CHATTEL MORTGAGE, WITH POWER TO SELL and replace the goods, construction and validity of: *Barnet v. Fergus*, 99 Am. Dec. 547, and note; *Deering v. Cobb*, 43 Am. Rep. 596; *Newlean v. Olson*, 3 Am. St. Rep. 286, and note 289.

MORTGAGE OF EXEMPT PROPERTY OPERATES AS WAIVER of right to claim exemption: See note to *Bowman v. Smiley*, 72 Am. Dec. 744, 745.

JOHNSON v. ASHLAND WATER COMPANY.

[71 WISCONSIN, 553.]

MASTER AND SERVANT. — **SERVANT, THOUGH A MERE VOLUNTEER, AND NOT EXPECTING ANY PAY FOR THE WORK DONE,** is, if engaged at the request of the man in charge of the work, for the time being, the servant of the master, and entitled to the same protection as his other servants.

MASTER AND SERVANT. — **WHEN FAILURE TO EMPLOY** a sufficient number of men to perform the work is the proximate cause of injury to a servant, the master is liable, unless such servant may fairly be said to have assumed the risk incident to carrying on the work with an insufficient number of men.

DAMAGES for injury sustained by plaintiff while employed by defendant. Demurrer to the complaint, that it did not state facts sufficient to constitute a cause of action. Order overruling the demurrer, and appeal from such order. The facts are stated in the opinion.

Tomkins and Merrill, for the appellant.

A. E. Dixon, for the respondent.

TAYLOR, J. It is claimed by the learned counsel for the appellant that the complaint does not state a cause of action, because it shows that the plaintiff was a mere volunteer in the work in which he was engaged at the time he received his injury. Under the allegations of the complaint, the plaintiff was engaged in the defendant's work at the request of the man in charge of the work; and although it may be said that his employment was for a mere temporary purpose, and that the plaintiff was not expecting any pay for the work done, and in that sense the employment was voluntary, still, being in the defendant's employment at the request of its servant or foreman, he was not a trespasser, and he was, for the time being, the servant of the defendant, and entitled to the same protection as any other servant of the defendant, and probably subject to the same risks of injury from the negligence of his fellow-servants. This seems to be the rule established by the authorities, and is supported by considerations of justice: *Ellwell's Evans on Agency*, 682; *Wood on Master and Servant*, 909, sec. 455; *Degg v. M. R. Co.*, 1 Hurl. & N. 773; *Potter v. Faulkner*, 31 L. J. Q. B. 30; *Warburton v. G. W. R. Co.*, L. R. 2 Ex. 30; 36 L. J. Ex. 9; *Wiggett v. Fox*, 11 Ex. 832; *Abraham v. Reynolds*, 6 Jur., N. S., 53; *Flower v. Pennsylvania R. R. Co.*, 69 Pa. St. 210; 8 Am. Rep. 251; *New Orleans etc. R. R. Co. v.*

Harrison, 48 Miss. 112; 12 Am. Rep. 356; *Street R. R. Co. v. Bolton*, 43 Ohio St. 224, 226; 54 Am. Rep. 803.

Conceding that the complaint shows that the plaintiff stood in the relation of a servant or employee of the defendant at the time the accident happened, does it state other facts which, if proved on the trial, would make the defendant responsible to him in damages for the injury received? We think this question should be answered in the affirmative. Laying out of view all other allegations in the complaint, the allegations contained in the last paragraph thereof are sufficient to make out his cause of action. If he proves on the trial that his injury resulted from the defendant's failure to employ a sufficient number of men to do the work in a safe and proper manner, and by reason of such want of men he was injured, then he is *prima facie* entitled to recover.

The courts have uniformly held that it is a duty which the employer owes his servants, when set to do any particular work, that he shall provide a sufficient number of men to do the work in a reasonably safe manner. This duty is placed on the same ground which requires the employer to furnish safe implements and appliances for doing the work, and a reasonably safe place in which the work is to be done. Wood, in his work on railway law (vol. 3, p. 1487, sec. 381), says: "The term 'appliances' of the business embraces not only machinery, premises, and all the implements of every kind used in and about the business, but also the persons employed to operate them; and the master must furnish a sufficient number of persons competent to perform the labor safely; and, when the failure to employ a sufficient number of hands to perform the particular service is the proximate cause of the injury, the master is liable, unless the servant may fairly be said to have assumed the risk incident thereto." This is a reasonable and just rule, and has been approved by all the courts in which the question has been raised, except in cases where the employee knew at the time that there was a want of sufficient help, and, notwithstanding such knowledge, entered into the employment: *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549, 554; 13 Am. Rep. 545; *Hayes v. Western R. R. Corp.*, 3 Cush. 270; *Mad River etc. R. R. Co. v. Barber*, 5 Ohio St. 541, 563; 67 Am. Dec. 312; *Skipp v. E. C. R. R. Co.*, 9 Ex. 223; *Booth v. Boston etc. R. R. Co.*, 73 N. Y. 39; 29 Am. Rep. 97.

The facts stated in the complaint negative any presumption that the plaintiff was aware of the fact that there was a want

of sufficient men to perform the work safely, which he was suddenly called upon to assist in doing. It cannot be said, therefore, from the facts stated in the complaint, that the plaintiff assumed the dangers incident to carrying on the work with an insufficient number of men. We think the complaint states a good cause of action, and the demurrer to the same was properly overruled.

By the COURT. The order of the circuit court appealed from is affirmed, and the cause is remanded for further proceedings.

MASTER IS LIABLE FOR INJURY TO SERVANT, where the number of servants employed is insufficient to do the work: *Jones v. Old Dominion Cotton Mills*, 3 Am. St. Rep. 92; *Mad River etc. R. R. Co. v. Barber*, 67 Am. Dec. 312; *Booth v. Boston etc. R. R. Co.*, 29 Am. Rep. 97.

MASTER IS LIABLE FOR INJURY TO SERVANT TEMPORARILY EMPLOYED: *Flower v. Pennsylvania R. R. Co.*, 8 Am. Rep. 251; *New Orleans R. R. Co. v. Harrison*, 12 Id. 356; *Street R. R. Co. v. Bolton*, 54 Id. 803. But in the note to *Scherfey v. Bailey*, 67 Am. Dec. 597, it is stated that a volunteer assisting the servant of another, either gratuitously or at the request of the servant, cannot recover against the master for an injury received.

STANLEY v. SULLIVAN

[71 WISCONSIN, 565.]

WRIT OF ASSISTANCE TO PUT EXECUTION PURCHASER in possession will only issue when the rights of the parties affected have been fully determined by judgment. The exercise of the power rests in the sound discretion of the court, and it will not be exercised in cases of doubt, nor under color of its exercise will title be tried or decided.

WRIT OF ASSISTANCE TO PUT EXECUTION PURCHASER in possession provided by the Wisconsin Revised Statutes, section 3025, will not issue when there is a contest as to the right of the execution purchaser to the possession of the land sold, as where the defendant sets up a *bona fide* claim of a homestead exemption in the land sold.

WRIT OF ASSISTANCE, PROVIDED by section 3025 of the Revised Statutes of Wisconsin, will not issue to aid an execution purchaser of an exempted homestead as against the owner thereof in possession at the time of the sale and application for the writ.

WRIT OF ASSISTANCE, PROVIDED by section 3025 of the Revised Statutes of Wisconsin, will only be issued when the applicant shows that at the time judgment was docketed the execution defendant had an interest in the land upon which the judgment became a lien, and that he or some one claiming under him by title subsequently acquired is in possession, and refuses to surrender to the purchaser.

WRIT OF ASSISTANCE. — JUDGMENT IN ACTION FOR DIVORCE, that plaintiff recover a certain sum of money, but not specifying that it is for ali-

mony or in lieu of alimony, or that it shall be a lien upon defendant's real or personal property, is a mere money judgment, under which execution cannot be levied upon defendant's homestead, nor, in such case, will the writ of assistance, provided by section 3025 of the Revised Statutes of Wisconsin, issue to put the purchaser in possession.

John Randall, for the appellant.

Stafford and Connor, for the respondent.

TAYLOR, J. This was an application by the appellant for a writ of assistance to put the applicant into the possession of a parcel of real estate which he claims had been sold on an execution issued upon a judgment in an action for divorce brought by Mary J. Sullivan, as plaintiff, against her husband, Daniel Sullivan, the respondent in this appeal. Upon such execution sale a sheriff's deed had been issued to the applicant. Possession of the premises had been demanded of the defendant, Daniel Sullivan, by the applicant, and he refused to surrender the possession to him. The respondent resisted the motion for the writ on the ground that the property sold on the execution was his homestead at the time the judgment was rendered and docketed, as well as at the time of the sale thereof upon said execution. The circuit court refused to order the writ to issue, but without prejudice to the right of the applicant to bring an action of ejectment to recover said lands.

The application for the writ was made under the provisions of section 3025 of the Revised Statutes of 1878. Previous to the enactment of said section in 1878, the courts had never had the right, or if they had, had never exercised the right, to issue a writ of assistance to put a purchaser of real estate upon an ordinary execution sale into the possession of the real estate so purchased by him. Previous to the passage of this law the purchaser's only remedy in this state was by action of ejectment against the party in possession if he refused to surrender the possession.

Courts of equity have from the earliest times exercised the right to issue the writ of assistance in actions in equity brought for the purpose of determining the rights of the litigants to the title or possession of real estate, after judgment declaring such rights, as well as in cases for the foreclosure of or redemption of mortgages. In such cases, the courts of equity having jurisdiction of the persons and property in controversy have, after determining the rights of the parties liti-

gant to the title or possession of real estate, rightfully assumed the power to enforce their judgments by the writ of assistance to transfer the possession, instead of turning the party over to a court of law to recover such possession: *Roberdeau v. Rous*, 1 Atk. 543; *Penn v. Lord Baltimore*, 1 Ves. Sr. 444; 2 Eden on Injunctions, Waterman's ed., 425; *Stribley v. Hawkie*, 3 Atk. 275; *Huguenin v. Baseley*, 15 Ves. Jr. 180; *Garretson v. Cole*, 1 Har. & J. 387; *Buffum's Case*, 13 N. H. 14; *Devaucene v. Devaucene*, 1 Edw. Ch. 272; *McKomb v. Kankey*, 1 Bland, 363; *Kershaw v. Thompson*, 4 Johns. Ch. 610; *Valentine v. Teller*, 1 Hopk. Ch. 422; *Diggle v. Boulden*, 48 Wis. 477; *Schenck v. Conover*, 13 N. J. Eq. 220; 78 Am. Dec. 95. In these cases the writs only issued when the rights of the respective parties to be affected by it had been fully determined by the judgment in the action. In the case of *Schenck v. Conover*, *supra*, it is said: "It is scarcely necessary to add that the exercise of the power rests in the sound discretion of the court. It will never be exercised in a case of doubt, nor under color of its exercise will a question of legal title be tried or decided." This limitation upon the exercise of the right to issue a writ of assistance is recognized by all the authorities: See *Langley v. Voll*, 54 Cal. 435; *San Jose v. Fulton*, 45 Id. 316; *Henderson v. McTucker*, 45 Id. 647; *Barton v. Beatty*, 28 N. J. Eq. 412; *Vanmeter v. Borden*, 25 Id. 414; *Thomas v. De Baum*, 14 Id. 41.

We think the rule under the statute is no broader than the rule at common law when applied to cases coming within the statute. The statute extends the power to issue the writ to cases not coming within the common-law rule, but it was clearly not intended that the power should be exercised in a case where there was a *bona fide* contest as to the right of the purchaser at the execution sale to the possession of the lands under such sale. The statute starts out by declaring that "whenever a title shall have been perfected in any person to any real estate sold by virtue of an execution, or to any part thereof or interest therein, and the person against whom such execution issued, or any other person claiming under him by title arising subsequently to the docketing of the judgment upon which it issued, shall be in possession of any such real estate, or part thereof, or interest therein," etc. We think it is evident that this section, read in connection with our law in regard to homestead exemptions, could not have been intended to compel the court to issue the writ of assistance in favor of the purchaser of such exempted homestead upon an

execution issued against the owner of the homestead in possession thereof at the time of its issue and sale, and at the time the writ was applied for. The letter of the statute might be said to apply to such a case, but it seems to us very clear that such is not the spirit or meaning of the act. In the case of the sale of the homestead, there would, under the law exempting it, be a failure on the part of the purchaser at the execution sale to acquire a title thereto by virtue of such sale. If, on the application for the writ in such case, there be a *bona fide* contention on the part of the defendant for the homestead exemption, we think it is eminently proper that the court should refuse the writ, and leave the parties to settle the right in an action at law, where the merits of the claim of the defendant may be passed upon by a full trial before a court and jury.

In order to obtain the writ of assistance under the statute, the applicant must show that at the time the judgment was docketed the defendant in such execution had an interest in the real estate upon which the judgment so docketed was a lien, and that such defendant, or some one claiming under him by title acquired subsequently to the docketing of such judgment, is in possession and refuses to surrender such possession to the purchaser. On the application for this writ, the respondent meets the claim by alleging that the judgment and execution under which the applicant for the writ claims the land never was a lien thereon, and that the property never was subject to sale upon such execution. The claim made by the respondent is not so clearly unfounded as to justify the court in holding, upon this application, that it is not made in good faith, or that it is so frivolous, either in fact or in law, that it should be ignored and the writ issued.

The learned counsel for the appellant claims that the judgment rendered in the divorce case against the defendant in the execution, the respondent on this appeal, is a lien upon the homestead. That presents a question of law, and might perhaps be determined upon the application for a writ of assistance under the statute; and if it must be held as a question of law that it was a lien upon the homestead of the respondent, and that such homestead was subject to sale on such judgment, as any other real estate owned by him, there would then seem to be no good reason for turning the appellant over to his action of ejectment to recover the possession of said premises. The judgment in the divorce case under which the execution was issued and the sale made, after

adjudging that the said Mary J. Sullivan be divorced from the said Daniel Sullivan, proceeds to adjudge as follows: "And it is hereby further ordered and adjudged that the plaintiff be allowed, and have and recover of the said defendant, Daniel Sullivan, by a judgment of this court, the sum of \$800, and \$50 as attorney's fees, and the costs of this action, taxed at \$62.90, and that execution issue therefor."

It will be seen that this is a mere money judgment, upon which execution is directed as in ordinary money judgments. It is not even declared that the eight hundred dollars is for alimony or in lieu of alimony, and it does not declare that the judgment shall be a lien upon any of the defendant's real or personal estate. If a lien upon his real estate at all, it became so by docketing it as a money judgment. An execution issued upon this judgment can have no other efficacy than an execution issued upon any other money judgment. A homestead of the defendant is exempt from sale upon any execution issued upon any judgment for the recovery of money: See R. S., sec. 2983. The judgment upon which the execution in this case issued did not declare on its face that it should be a lien upon the homestead of the defendant, as the court probably might have declared it to be; and in the absence of any such declaration of the court, it must be treated as having the same force as an ordinary judgment. We do not hesitate to say that, upon the showing made by the record introduced on the hearing, the judgment was not a lien upon the homestead of the defendant, if he had one, and that the writ of assistance was properly refused on that ground. Whether, as a matter of fact, the premises in question were and are the homestead of the respondent, Sullivan was not determined by the court on the application for the writ; and because the fact whether it was or was not a homestead was a matter of uncertainty upon the proofs offered upon the hearing of the motion, the court was right in refusing the writ. See cases above cited.

It is said by the learned counsel for the appellant that the circuit court had adjudged, in a former proceeding in the divorce action, that the premises in question were not a homestead. After a careful reading of these proceedings, it appears to us that the question of homestead was not in issue in said proceedings, and was not passed upon by the court. The proceedings referred to by the learned counsel were the proceedings upon a motion made by the defendant, Daniel Sullivan.

in the divorce suit, after judgment, to set aside said judgment, or that part of it which adjudged that he should pay the plaintiff, Mary J. Sullivan, the sum of eight hundred dollars and the costs of the action. The grounds of the motion were, that the judgment was for too large an amount, considering his ability to pay, and on the further ground that there was an agreement before judgment was entered, between the attorneys of the parties, that no judgment for alimony or allowance for the plaintiff should be taken in the action. The question of the liability of the homestead to be sold for the payment of the judgment was not discussed or considered by the court, so far as we are able to discover from the proceedings.

By the COURT. The order of the circuit court is affirmed.

WRIT OF ASSISTANCE, POWER TO GRANT rests in the sound discretion of the court, and will not be exercised in case of doubt, nor to try or decide a question of title: *Schenck v. Conover*, 78 Am. Dec. 95, and note 101; note to *Wilson v. Polk*, 51 Id. 172-174. "Generally, a writ of assistance will be directed only in a clear case, and when the respondent cannot possibly have any rights which were not subjected to the decree. If, for instance, he sets up and appears to claim in good faith a right to the possession derived from and under the purchaser, or from the defendant, prior to the commencement of the suit, the validity and effect of his claim will very rarely, and perhaps never, be tried upon application for this writ, but he will be left in possession": *Freeman on Executions*, sec. 37 d.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

DAVIS *v.* CHAPMAN.

[88 VIRGINIA, 67.]

ADMINISTRATOR IS CHARGEABLE WITH LOSS OF PROCEEDS OF DRAFT PAYABLE TO HIM as administrator, where he indorses it for collection, and places it in the hands of persons whom he does not know, and does not know to be reliable.

ADMINISTRATOR OF CREDITOR OF UNITED STATES MAY RECEIVE PAYMENT ANYWHERE that the government may choose to pay it; and a surety on his bond, wherever given, is accountable, if he collects the claim and fails to account for it, no matter where the payment is made.

ASSETS OF ESTATE OF DECEDENT MAY BE CALLED IN FROM HANDS OF PERSONAL REPRESENTATIVE and placed in the hands of a receiver by a court of equity, especially in a creditor's suit.

BILL in equity. The opinion states the case.

H. W. Thomas and C. E. Stuart, for the appellant.

R. W. Moore and S. F. Beach, for the appellee.

FAUNTLEROY, J. At the December term, 1872, of the county court of Fairfax County, Virginia, Lyman Broughton qualified as administrator *de bonis non* of the estate of Waite Broughton, deceased, executing an official bond in the penalty of two thousand dollars, on which the appellant, J. C. Davis, became surety. In 1880, the appellee John Chapman, for himself and other creditors of the said Waite Broughton, deceased, filed his bill against the said Lyman Broughton, administrator *de bonis non* of Waite Broughton, aforesaid, and John C. Davis, surety on his official bond, for the purpose of compelling a settlement of the administration accounts of the said Lyman Broughton, administrator *de bonis non* as aforesaid. The bill

charges that Lyman Broughton, among other claims due the estate of his intestate which came into his hands as administrator, had received a claim against the United States for damages to decedent's property during the Civil War, upon which he had received the sum allowed and paid by the United States government of two thousand eight hundred dollars, for which said sum he had failed to account.

The defendants, Lyman Broughton, administrator *de bonis non*, and his surety, J. C. Davis, the appellant, filed their separate answers to the bill, denying their liability, on the ground that, as the administrator alleges, the claim was lost through the dishonesty of the claim agents employed by him to prosecute the claim, and that as the claim was paid to the said agents by the United States government in Washington City, District of Columbia, and was never received in Virginia, he cannot be held accountable for it here.

During the progress of the cause it was referred to a master commissioner of the court to ascertain and report what amount, if any, had been collected, and by whom, on the said claim against the government, with a transcript of the record of the treasury department relating to the matter, and the deposition of the administrator himself in evidence, showing that a draft was issued July 19, 1878, for two thousand eight hundred dollars, payable to the order of Lyman Broughton, administrator, which draft was presented at the treasury, and paid, indorsed by Lyman Broughton, administrator, and by John H. Ferry. The master commissioner reported that the administrator had collected two thousand eight hundred dollars on the said claim from the United States government July 19, 1878, and was chargeable with that sum as due the estate of his intestate, with interest thereon from the said date of its collection. To this report exceptions were filed, and the deposition of the said Lyman Broughton, administrator, denying that he had ever received the money aforesaid, and alleging that it had been lost, and he had been defrauded out of it by the dishonesty of the agents employed by him to collect it. At the November term, 1882, of the said court, the cause was heard on the bill, answers, the deposition of the administrator, Lyman Broughton, the master's report, and the exceptions thereto, a draft drawn upon the treasury of the United States in favor of Lyman Broughton, administrator, for two thousand eight hundred dollars, and other papers filed by complainant; whereupon the court decreed that fifty per

centum of the said sum of two thousand eight hundred dollars should be allowed and credited to the administrator for counsel fees and expenses of collection, and decreed against the administrator and his surety for fourteen hundred dollars, with interest thereon from the nineteenth day of July, 1878, the date of collection, to be paid to O. W. Hunt, general receiver of the court; and by a decree of June term, 1883, leave was granted to said Hunt to institute any suit necessary to enforce the decree of the November term, 1882, aforesaid. From these decrees, the surety, John C. Davis, on the administrator Lyman Broughton's official bond, appeals, and attacks the decrees as erroneous, for grounds of error assigned in his petition.

1. Because the fund which ought to have been received by the said administrator never came into his hands, but was lost by the dishonesty of the agents whom he employed to collect the claim. Other than Broughton's own deposition, there is an entire absence of proof of dishonesty on the part of the agents whom he selected, employed, and trusted to collect this large claim due from the United States government to the estate of his intestate. A statement dated April 4, 1882, made by one Randall, and placed among the papers in the case by the appellant's counsel prior to the decree, says: "Ferry was engaged in the prosecution of claims from a short time after the close of the war until he left the city, about three years ago. Black was regarded as a man of means, but his property was in Montana. Ferry was not regarded as a man of means, and until a short time before he left here was considered a reliable man, but since his departure there have been rumors that he fell into disfavor with the treasury department." Who Randall is, or what connection he had with Broughton, is not disclosed. Black and Ferry lived in Washington City, and were agents to prosecute claims against the government. Broughton offered no evidence, nor did he take the deposition of a single witness, to establish the allegation of dishonesty charged in his answer. Randall's statement does not belong in the record. He was never examined or cross-examined as a witness, and his statement furnishes no support to the averment of the answers. If this administrator actually realized the proceeds of this claim, which was assets of the estate in his hands, in the shape of a successfully prosecuted and allowed claim against the government, represented by a draft upon the United States treasury

for two thousand eight hundred dollars, made payable to him as administrator, and which could not be used, realized, or received by any one without his indorsement, he is liable. If, as he alleges, he indorsed the draft (and did not collect it himself, of which there is no evidence in the record), but recklessly, negligently, and improvidently put it, so indorsed by him as administrator, into the hands of men whom he himself says he did not know, nor nothing as to their honesty or responsibility, and whom he says he never "afterwards saw again," he is equally liable for the waste, upon all fixed rules controlling the administration of estates, and the responsibility of fiduciaries. In the case of *Kee v. Kee*, 2 Gratt. 116, this court said: "The duties of the executor are to be performed under the obligations of sound judgment, acting on these considerations of worldly prudence which affect the safety of the pecuniary interests confided to his care." See also *Southall v. Taylor*, 14 Id. 281.

Broughton, this administrator, says, in his deposition, of these men, Ferry and Black, whom he not only employed to prosecute this claim but to whom he gave the draft, which was payable only to him, indorsed by him as administrator: "I did not know them; I did not know that they were reliable"; and he disclaims any knowledge of their first names, or even of their address. He did not even contract with them so as to protect the estate against exorbitant charges for prosecuting the claim, but he swears that "the first was to have twenty-five per cent; the other man what he chose." He said that these agents said: "None of it [the proceeds of the claim] belonged to him; that it belonged to creditors of the estate; that he was not administrator; that they were administrators, and parties must come to them." He made no denial of or resistance to this absurd and sinister pretension, but parted with the realized proceeds of the claim by indorsing and delivering the draft to these men, not to collect it and to settle with him, but avowedly to exclude him from it, and (as he alleges) to retain and embezzle it entirely. He thus not only used no caution, prudence, or discretion in the transaction with these men, but he swears that he let the matter rest; that he made no effort to collect the money, or signified any desire or purpose to obtain restitution; that he has never seen or heard from these swindlers since 1878, since he indorsed and gave them the draft, and does not know where they now are, although informed by Randall's statement that Black

owned property in Montana, and that Ferry is a railroad man in New Jersey. There is abundant proof in the record, in the very deposition of the administrator himself, of his gross negligence and extraordinary imprudence and reckless dealing in regard to this transaction; and it is impossible to read the record without being impressed with the belief that this fiduciary did in fact collect and waste the fund which he now denies having received: See *McCloskey v. Gleason*, 56 Vt. 264; 48 Am. Rep. 770; *Bradstreet v. Everson*, 72 Pa. St. 124; 13 Am. Rep. 665.

The second assignment of error sets forth, as matter of law, that there is no liability upon the bond, because the claim was prosecuted in the District of Columbia, and the money, if collected, was not brought within the jurisdiction of the state of Virginia. Whatever may be the doctrine of non-liability when the personal representative collects assets from a non-resident private debtor, and does not bring them or their converted value within the jurisdiction where he qualified, it can have no application or relation to this case. The supreme court of the United States has repeatedly held that the federal government owing a debt must not be regarded or treated as outside of the jurisdiction where the letters of administration were granted.

In *Vaughan v. Northup*, 15 Pet. 6, the court said: "The debts due from the government of the United States have no locality at the seat of government. The United States, in their sovereign capacity, have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicile. On the contrary, the administrator of a creditor of the government, duly appointed where he was domiciled at his death, has full authority to receive payment and give a full discharge of the debt due his intestate in any place where the government may choose to pay it, whether it be at the seat of government, or at any other place where the public funds are deposited."

To the same effect is *Wyman v. Halstead*, 109 U. S. 654, reversing the supreme court of the District of Columbia, and held that the repeal of the act of 1812, by omission, did not alter or weaken the rule laid down in *Vaughan v. Northup*, 15 Pet. 6. The court said: "In the case at bar, neither the facts that the drafts were made payable at the treasury of the

United States, in the city of Washington, nor the deposit, pursuant to section 307 of the Revised Statutes, of the money represented by the drafts in the treasury to the credit of the payees, affected the character or the validity of the debts. But the United States, in their sovereign capacity, having no domicile in any part of the Union rather than in any other, do not, by establishing at the national capital a treasury for the transaction of the principal business of the financial department of the government, and making their money obligations payable there, confine their presence or their powers to this spot."

In the case of *Taylor v. Bemiss*, 110 U. S. 42, a fiduciary, who was appointed in Louisiana, held a Southern war claim against the government (just such a claim as Broughton held); in passing on the question of her liability or accountability, the court said: "We are of opinion that this appointment made it her duty to take necessary legal steps to obtain this money from the United States. She was equally bound to prosecute it with diligence, and to do all that was necessary to recover the money. The subject of such payments by the United States to administrators appointed in the states is very fully discussed in the case of *Wyman v. Halstead*, *supra*, and upon the principle there laid down we are of opinion that payment to Mrs. Bemiss, under the Louisiana appointment, is a valid payment, and that she is responsible under that appointment."

These cases determine that the fiduciary is bound to see to the collection of the claim; that in claims against the government no question of locality arises; that he can prosecute and collect it anywhere; and that his bond, wherever given, is accountable if he neglect to collect, or, having collected, if he fail to disburse and account.

The third and last error assigned is, that the decree was rendered in favor of the general receiver of the court. In a creditors' suit against a personal representative, the court will always preserve the fund. In the case of *Farmer v. Yates*, 23 Gratt. 145, a decree fixing the amount of assets in the fiduciary's hands, and directing their collection by a receiver, was affirmed. Judge Moncure, in delivering the opinion, said: "In a creditors' suit, especially, it seems to be fit and proper that the court should have power to call in the assets from the hands of a personal representative. In such a suit the court, in effect, becomes the personal representative, has control of

the assets, reduces them into possession, and applies them in due course of administration."

We see no error in the decrees of the circuit court of Fairfax appealed from, and they must be affirmed.

Decrees affirmed.

LIABILITY OF EXECUTOR OR ADMINISTRATOR FOR LOSS OF TRUST PROPERTY is discussed in the note to *Rubottom v. Morrow*, 87 Am. Dec. 326, 327. In *Norwood v. Harkness*, 49 Am. Rep. 739, an administrator, who had deposited funds in a bank which was generally reputed to be solvent, was held not liable for loss of such funds by the subsequent failure of the bank.

COURT OF EQUITY HAS POWER TO APPOINT RECEIVER over property in hands of executor or administrator, in proper case: See note to *Cortelyou v. Hathaway*, 64 Am. Dec. 489.

NICHOLS v. WASHINGTON, OHIO, AND WESTERN RAILROAD COMPANY.

[83 VIRGINIA, 99.]

OWNER OF PREMISES WHO DIRECTLY OR BY IMPLICATION INDUCES PERSONS TO ENTER on and pass over them, thereby assumes an obligation that they are in safe condition, and suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby. Where, therefore, the direct and usual path to a railroad depot is over a switch on which freight-cars frequently stand, with an opening habitually left between them so as to leave the path unobstructed, and this path is constantly used by persons getting on and off at the depot, without such use being at any time discountenanced by the company or its officials to whom it is known, it will be assumed that the company invites persons having business at the depot to use that path between the cars in going there, and it is not negligence *per se* for them to do so; and if a person in passing between the cars is injured by the cars being suddenly and without warning run together, the company is liable in damages for the injury.

TORT. The opinion states the case.

Holmes Conrad and E. Nichols, for the plaintiff in error.

Barton and Boyd, and E. P. Janney, for the defendant in error.

HINTON, J. This is an action of tort, brought by the personal representative of Francis E. Nichols, to recover damages for injuries sustained by him which caused his death.

A trial was had before a jury, which resulted in a verdict for the plaintiff for four thousand dollars. This verdict the court, upon the defendant's motion, set aside; and to this ac-

tion of the court, as well as its action in refusing certain instructions and in giving others, the plaintiff duly excepted. At the next term the case was submitted to the court, when a judgment was rendered for the defendant, and thereupon this writ of error was taken. The facts certified as proven on the first trial, and submitted to the judge on the second, with the plat filed as a part thereof, show the topography of the ground, the location of the depot and other buildings in the vicinity, and the position of the cars on the defendant's track immediately preceding the accident to have been as follows: The main track of the defendant's railroad runs nearly due east and west, and about one hundred and fifty yards south thereof and parallel thereto is a pike running through the center of the village of Purcelville. From this pike a road runs in a northwesterly direction across the railroad to Hillsboro.

Extending eastwardly from this road, and immediately south of the railroad, is the freight depot, and adjoining which, but still farther east, is the passenger depot. Along the north side of both freight and passenger depots is a platform, usually more or less obstructed by the freight and express goods habitually unloaded thereon; and along the east end of the passenger depot there is also a platform, with three steps at its southern terminus extending to the ground. Beginning at a point on the main track some distance west of the Hillsboro road is a switch, which extends eastwardly across said road; and around and beyond said depot buildings, and from a point on the Hillsboro road about sixty yards south of the passenger depot, is a path which extends towards the steps at the southeastern corner of the passenger depot, and this path is usually taken by persons going to and from the depot. The land east of the Hillsboro road, and south of the railroad, is open, and nearly level, while that west of the Hillsboro road, and south of the railroad, is woods, — dense near the pike, and sparsely timbered as it extends northwestwardly towards the switch. The switch, or rather that portion of the switch west of the Hillsboro road, runs through a cut so deep that, by reason thereof, and the intervention of a warehouse which stands near the track, the smoke-stack of an engine can only be seen by persons going along the before-mentioned path while in the line of vision between the warehouse and the switch.

It appears that it was the invariable custom of the agent at

the depot to part freight-cars, immediately after they were left or placed on the switch, at a point nearly opposite the passenger depot, for the purpose of affording a passage to the patrons and employees of the road; and it specially appears that it had been done in this instance, although it would seem that, from lack of assistance, the opening left was scarcely as wide as usual. At no time was anything said or done by the defendant's agents or employees to convey to the public the idea that they should not cross the track at these openings. On the morning of the accident, there were standing on the switch two or more cars west of the road, and five cars east of the road. These five cars had been parted on the preceding day by the company's agent a distance of eighteen inches or more about midway between the path and the steps at the southeast corner and the platform of the passenger depot, for the express purpose of allowing people to pass over the track; and this was the condition of the cars on the morning of the 9th of August, 1883, when the intestate, Frank E. Nichols, who was on his way to the depot to meet his brother, who was expected home on the train due at twelve, m., while in the act of passing over the track was caught between the cars and killed by the sudden and rapid backing of the engine, which drove the cars together.

Now it is agreed on all hands that there is a wide difference between the obligation which a person or corporation owes to a mere license, and the duty which the same person or corporation owes to one who comes upon his premises by an invitation, either expressed or implied.

In the first case, it is generally admitted that the party comes at his own risk, and enjoys the license subject to its concomitant risks or perils, and that in such case no duty is imposed upon the owner or occupant to keep his premises in safe and suitable condition for his use, and the owner or occupant is only liable for any wanton injury that may be done to the licensee: *Hounsell v. Smyth*, 7 Com. B., N. S., 738; *Barnes v. Ward*, 9 Id. 392; *Hardcastle v. South Yorkshire R'y*, 4 Hand. & N. 67; *Binks v. South Yorkshire R'y Co.*, 3 Best & S. 250; *Balch v. Smith*, 7 Hurl. & N. 741; *Sweeny v. Old Colony etc. R. R. Co.*, 10 Allen, 375; 87 Am. Dec. 644; *Carlton v. Franconia I. & C. Co.*, 99 Mass. 216; *Pierce on Railroads*, 274.

On the other hand, the law imposes an obligation on the owner or occupant to provide for the security against accident and injury of those he has invited or induced to come upon

his premises by such an adaptation and preparation of his place for their reception and use as would naturally lead them to suppose that they might properly and safely enter thereon. Accordingly, it has been generally held that where the owner or occupier, either directly or by implication, induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby. In all cases like the present, it is a question of prime importance, in determining the liability of the defendant, to ascertain whether the injured party was upon the premises at the time of the accident under a bare license or permission, or in pursuance of an invitation. Here the deceased must be regarded as having adopted this route in pursuance of an invitation held out to him by the conduct of the defendant company. The circumstance that the cars were habitually separated at this point, when taken in connection with the location of the steps to the platform of the passenger depot, and the constant uninterrupted use of the same by persons getting on and off at this depot, which was never at any time discountenanced by the road or its officials to whom it was known, is susceptible of no other construction than that it was designed as a path by means of which access might be gained to the depot, as well by persons having occasion to visit the depot as by the company's employees. Under these circumstances, it cannot be imputed to the deceased as negligence, if, in the absence of some warning, he selected this route rather than the other and longer one around by the freight depot. Under such circumstances, it seems to us clear that an obligation was imposed upon the company to see that it should not become a source of danger to those to whom it had held it out as a passage or way through which they might safely go, and a duty was imposed upon the company of notifying persons entitled or invited to use it, in some unmistakable way, that it was about to be closed before closing it: *Baltimore and Ohio R. R. Co. v. Fitzpatrick*, 35 Md. 38; *Gills v. Pennsylvania R. R. Co.*, 59 Pa. St. 129; 98 Am. Dec. 317; *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; 3 Am. Rep. 628.

Now, if we are right in the views already expressed, here was an invitation plainly extended to the plaintiff to cross the railroad at that point, for, as we have before intimated, the custom or habit of the company in making and leaving open a passage-way between the cars at this point, which the record

shows was fully known to its officers, taken in connection with the general adoption of it as the proper route by all persons having occasion to go to the passenger depot, and the failure of the company to provide for such persons some other unobstructed route, can be regarded as nothing else than an invitation from the company to the deceased to use that way. There can remain but one other inquiry, and that is this, Was the deceased, in accepting this invitation, so wanting in the ordinary care required of him as to deprive him of the right to recover? A question not difficult to answer, if we remember it amounts to nothing more than this, whether the danger in attempting to cross the track between those stationary cars was so obvious that a person of ordinary prudence would not have made the attempt. Let it be borne in mind that all that could be required of the deceased was reasonable care in view of the special circumstances of the case. The cars were not only at a standstill, but there is nothing to show that there was anything to indicate to the deceased that they were about to be set in motion. Under such circumstances, it was a matter of little consequence whether the cars were two or ten feet apart. In either case, there being nothing to indicate to the deceased that these cars were about to be moved, he had a right to suppose that he could effect his passage in safety. This was the view taken by the jury, and we entertain no doubt of its correctness. That there are cases where the question of negligence is one of law, to be decided by the court; but negligence, as a general rule, is a question of fact, which ought to be submitted to the jury; and this is always the case where the facts are in dispute, and the inferences which fair-minded men would draw from them are doubtful.

In this view of the case, it becomes unnecessary to consider the instructions.

The judgment of the circuit court of Loudoun County must be reversed, and a judgment will be entered here upon the verdict rendered on the first trial.

Judgment reversed.

OWNER OF PREMISES IS LIABLE IN DAMAGES TO ONE WHO, USING DUE CARE, COMES THEREON at the invitation or inducement, express or implied, of such owner, for injuries occasioned by the unsafe condition of the premises: *Donaldson v. Wilson*, 1 Am. St. Rep. 486, and cases in note; and see note to *Zoebisch v. Tarbell*, 87 Am. Dec. 660-667, discussing the question. In *Wabash etc R'y Co. v. Locke*, 2 Am. St. Rep. 193, it is held to be the duty of a railroad company to have its premises in reasonably safe condition, to

prevent injury to persons properly thereon. And in *Byrne v. New York Cent. R. R. Co.*, 58 Am. Rep. 512, it is held that if a railroad company has long, constantly, and notoriously permitted the public to cross its track at a place not in a highway, it is bound to use reasonable care toward persons crossing, and to give notice and warning to them to prevent injury.

SEAMSTER v. BLACKSTOCK.

[83 VIRGINIA, 232.]

DECREE OF COURT MAY BE VOID BECAUSE IT HAS EXCEEDED ITS JURISDICTION in the progress of the cause, even though it obtained jurisdiction rightfully. And where in a suit the sole object of which is the assignment of a widow's dower in the land mentioned in the bill, the county court not only assigns the dower, but also, *sponte sua*, decrees a sale of the residue of the land, it plainly exceeds its jurisdiction, and its decree is void, and may be collaterally attacked.

DECREE OF COURT, PROHIBITED BY STATUTE FROM DECREETING SALE OF LAND for partition when the interest of any party exceeds three hundred dollars, is void where the record affirmatively shows that the interest of each party exceeds that sum.

DISMISSAL OF PETITION PRAYING FOR ANNULMENT OF VOID DECREE cannot affect the rights of the parties to such decree, nor prevent them from attacking it in a collateral proceeding.

EJECTMENT. The opinion states the case

W. R. Barksdale, W. W. Henry, and H. Edmunds, for the plaintiffs in error.

John W. Riely, for the defendants in error.

RICHARDSON, J. The plaintiffs, the defendants in error here, are the heirs at law of William Blackstock, who died intestate, in 1861, and they claim as such heirs. The defendants claim title through and under one Allen Conner, now deceased, who purchased the land in controversy under a decree of the county court of Halifax County in 1862. No conveyance, however, appears to have been made to the purchaser, or ordered by the court. The sale was made in a certain chancery suit, which was brought in the said county court in 1862, by the widow of the said William Blackstock, deceased, for the sole purpose of having assignment of her dower in the lands of her said deceased husband. At the time the suit was brought, and when the sale above mentioned was made, the heirs at law of the decedent were infants, and they were made defendants to the bill. The single object of the suit was the assignment of the widow's dower in the land men-

tioned in the bill. The court, however, not only directed that the dower be assigned, but apparently, *sponte sua*, decreed a sale of the residue of the land, which was made to Conner as aforesaid, who duly paid the purchase-money in full. The money, except the share of one of the heirs, was subsequently invested, under an order of the court, in confederate securities, and of course was lost by the result of the war. The principal question presented for decision is as to the effect of the proceedings in the said chancery suit. The defendants relied on the record of those proceedings upon the trial in the court below as evidence in part of an equitable title on their part, which, they insisted, constituted a bar to the plaintiffs' recovery. The circuit court, however, held otherwise, and gave judgment on the special verdict for the plaintiffs.

The plaintiffs, the defendants in error, contend, on the other hand, that the record so relied on by the defendants, the plaintiffs in error here, is without any effect in the present action, for two reasons, to wit: 1. Because the provisions of the code above mentioned do not apply to judicial sales, but only to contracts of sale made directly by a "vendor" to "a vendee," who acts without the compulsion of an order or decree of a court; 2. Because the decrees and proceedings relied on are void.

Passing by the first of these questions as unnecessary to be decided, we will consider the second.

It is an elementary principle in our jurisprudence that jurisdiction of the subject-matter and the parties is essential to the conclusiveness of a judgment or decree. And though a court may obtain jurisdiction rightfully, yet its decrees may be void, because, in the progress of the cause, it has exceeded its jurisdiction. The adjudged cases furnish numerous examples of this kind. Thus where a bill is filed to sell a certain lot, and a decree is entered for the sale of another and different lot, not named in the bill, and to which the bill has no relation, such decree, as respects the last-mentioned lot, is a nullity. This principle is illustrated by the case of *Wade v. Hancock*, 76 Va. 620. In that case it was held that in summary proceedings under section 9, chapter 7, of the code of 1873, the circuit courts of the state have jurisdiction to appoint, change, and remove church trustees, but not to determine how they shall administer their trust; and accordingly, the judgment complained of was held void, because in pronouncing it the court had exceeded its jurisdiction. In

delivering the opinion of the court, Burks, J., cites with approbation the case of *Ex parte Lange*, 18 Wall. 163, in which this question is discussed with much learning and ability by Mr. Justice Miller, in delivering the opinion of the supreme court of the United States. See also 7 Rob. Pr. 107 et seq., where numerous cases to the same effect are referred to. The application of these principles is decisive of the present case. Here the county court in discussing a sale of the residue of the land, after allotting the widow's dower, went far beyond the case made by the bill, or anything contemplated thereby, and plainly exceeded its jurisdiction, the result of which is, the proceedings under the decree of sale are void, and may be attacked collaterally. Various irregularities are alleged to have occurred in the proceedings in the county court, but it is unnecessary to make particular reference to them here, because, even if the decree of sale had been consistent with the averments and prayer of the bill, and in other respects regular, yet the decree would have been void, since the statute, as it then was, prohibited the county courts from decreeing a sale of land for partition when the interest of any party exceeded in value the sum of three hundred dollars: Code 1860, p. 581, sec. 3. And here the record affirmatively shows that the interest of each party exceeded in value that sum.

It appears, however, that in 1876, the suit was transferred from the county to the circuit court of Halifax County, and that after its removal the plaintiffs in this action, the defendants in error, appeared in the latter court and filed their petition, alleging errors in the proceedings in the county court, insisting that the decrees made therein affecting their rights were void, and praying that the same be reheard and annulled. To the petition there was a demurrer and answer; and upon the hearing the petition was, in general terms, dismissed. The plaintiffs in error now contend that the decree dismissing the petition finally settled the rights of the parties, and that the matters therein alleged are *res judicata*. But in this contention we do not concur.

In *Durant v. Essex Company*, 7 Wall. 107, it was held that a decree, absolute in its terms, dismissing a bill in equity, is an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the

complainant had an adequate remedy at law, or upon some other ground which does not go to the merits. And, said the court, where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits. See, however, what is said in *Chrisman's Adm'rx v. Harman*, 29 Gratt. 494, 501; 26 Am. Rep. 387.

In the present case, it is unnecessary to express an opinion as to the effect of such a decree; for clearly the decree of the circuit court, dismissing the petition, can have no greater force or effect than if it had been made by the county court before the removal of the cause to the circuit court. And we take it to be indisputable that no order or decree by a court can be clothed with vitality unless the court has jurisdiction to render it. So that if the sale of the land in controversy was void, as we have shown it was, the rights of the parties, the defendants in error, were not and could not be affected by the decree dismissing the petition, in which the jurisdiction of the county court to order the sale was denied. In other words, that decree constitutes no bar to the maintenance of the present action.

Only one other point in the case need be mentioned. It appears from the record of the proceedings in the county court that one of the plaintiffs, D. A. Blackstock, attained his majority during the war, and soon after the sale of the land had been made, and received his share of the proceeds. It does not appear, however, that any defense on that ground was made in the court below. Whether such fact, if it had been relied on, would estop the said D. A. Blackstock from asserting any claim to the land, is a question, therefore, as to which we express no opinion.

The judgment of the court below must be affirmed, with costs to the defendants in error.

Judgment affirmed.

JUDGMENT WITHOUT JURISDICTION OF SUBJECT-MATTER OF ACTION IS VOID: See *Hahn v. Kelly*, 94 Am. Dec. 742, and note.

DECREE MAY BE VOID BECAUSE COURT HAS EXCEEDED ITS JURISDICTION in the progress of the cause: *Anthony v. Kasey*, *post*, p. 277.

DARRACOTT v. CHESAPEAKE AND OHIO R. R. Co.

[83 VIRGINIA, 288.]

RIGHT TO OBJECT TO RULING OF COURT ON DEMURRER IS WAIVED by amending the declaration and going to trial on the merits.

EMPLOYEE OF RAILROAD COMPANY IS GUILTY OF CONTRIBUTORY NEGLIGENCE, when, in violation of the company's rules, he puts himself in a position of obvious danger, in consequence of which he is injured.

DUTY OF RAILROAD COMPANY TO ITS EMPLOYEES IS DISCHARGED BY EXERCISE OF ORDINARY CARE, by which is meant such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise. Such company is not bound to change its machinery in order to apply every new invention or supposed improvement in appliance, but may use an appliance less safe than another in use, provided its employees be not deceived as to the degree of danger that they incur.

EMPLOYEE OF RAILROAD COMPANY IS BOUND TO EXERCISE ORDINARY CARE to avoid injuries to himself, and any negligence on his part amounting to the want of ordinary care, which is the proximate cause of the injury, will defeat an action against the company.

DANGER INCIDENT TO USE OF THREE-LINK COUPLINGS FOR RAILROAD CARS may be considered as one of the ordinary perils, the risk of which, by his contract of service, a brakeman, who had ample means of knowing that such couplings were often made by the company, assumes.

TRESPASS on the case. The opinion states the facts.

Sands, Leake, and Carter, for the plaintiff in error.

William J. Robertson and H. T. Wickham, for the defendant in error.

LEWIS, President. The case presents no new question, and may be briefly disposed of. The first assignment of error is, that the circuit court erred in sustaining the demurrer to the declaration. A sufficient answer, however, to this objection is, that by amending the declaration and going to trial on the merits, the right to object to the ruling of the court on the demurrer was waived. This is a well-settled rule, in support of which counsel for the defendant in error refer to the pertinent language of Nelson, C. J., in *Jones v. Thompson*, 6 Hill, 621, who said: "By amending and pleading the general issue, the defendant admitted the correctness of the judgment on the demurrer. Had he intended to rely upon any error in that judgment, he should not have amended, but left the issue upon the record. . . . Who ever heard of an issue at law upon the record in this court after the party demurring has availed himself of the privilege by joining an issue of fact?" Upon a similar point in *Clearwater v. Meredith*, 1 Wall. 25,

the supreme court of the United States said: "When the plaintiff replied *de novo*, after a demurrer was sustained to his original replication, he waived any right he might have had to question the correctness of the decision of the court on the demurrer. In like manner, he abandoned his second replication when he availed himself of the leave of the court, and filed a third and last one." And the same rule prevails in equity: *Marshall v. Vicksburg*, 15 Wall. 146. No other authority, however, need be cited than the decision of this court in *Hopkins v. Richardson*, 9 Gratt. 485, which is directly in point, and in accordance with the view we have expressed.

The question then is, whether the plaintiff is entitled to recover upon the evidence before the jury, which is certified with the record, and upon which the case was afterwards decided by the circuit court. And in this connection two questions have been raised: 1. Whether the company was negligent; and 2. Whether the plaintiff was guilty of such contributory negligence as to defeat a recovery.

The evidence shows that the car, the coupling fixtures of which were defective, left Hinton, West Virginia, in good condition, coming east, on the 26th of December, 1881. It was a flat-car, loaded with lumber, and was one of a number of freight-cars composing the same train. When it arrived at Staunton its drawhead was found to have been pulled out or broken, which necessitated the use of what is called "the three-link coupling," in order to carry it to its destination without delay. The evidence also shows that such accidents are of frequent occurrence, and that upon such occasions, to avoid delay in the transmission of freight, the three-link coupling is usually resorted to. It is made by attaching two chains, of three links each, to hooks some distance apart on the bottom sill of the damaged car, and then inserting the end links of the chains, placed one upon the other, in the sound drawhead of the car to which the coupling is to be made. There they are fastened with a pin, as in ordinary coupling.

This mode of coupling is as safe as the ordinary one-link coupling for carrying cars forward, but is more dangerous to make if made while the cars are in motion. A rule, however, of the company expressly forbids employees entering between cars when in motion to uncouple them; and the same rule, in view of the evidence before us, undoubtedly applies to the coupling of cars where the three-link coupling is made. Its

language is as follows: "Entering between cars when in motion to uncouple them, and all such imprudences, are dangerous and in violation of the rules of this company." A printed copy of the rules, of which this was one, was furnished to the plaintiff, and receipted for by him, more than a month before the accident occurred.

The evidence does not show that the plaintiff knew, or with the exercise of reasonable diligence might have known, of the condition of the defective car before it reached Hanover Junction, where the accident occurred. Several of the defendant's witnesses say they are of the impression that they previously called his attention to it, but he himself testifies positively to the contrary.

The accident occurred in this way: The train upon which the plaintiff was employed was divided into three sections just before reaching Hanover Junction, on a down grade. The first section remained attached to the engine, and was carried down to the junction. The second, or middle section, followed a short distance behind, and, when it reached the junction, was switched off on a side-track, and was there stopped. The third, or rear section, was then brought down, moving slowly. As it approached the first section, standing on the main track, the plaintiff went to the rear end of the first section to make the coupling between the two sections. There he took position, standing with one foot between the rails, the other outside, with his right hand resting on the rear sill of the rear car. He stood in this position for several minutes until the arrival of the third section, at the head of which was the damaged car, with the two chains hanging from the hooks of its front sill, to which they were attached. The track at this point is straight for a mile or more in either direction, thus giving the plaintiff ample opportunity to have observed the defective condition of the approaching car. He testifies that he did not, in fact, observe its condition until the car was within four feet of where he stood,—too late, he says, for him to have left the track with safety. But upon this point the evidence is conflicting.

A rule of the company provides that, "in coupling cars, a stick should always be used," when possible, which materially lessens the danger of coupling. Nevertheless, the plaintiff undertook to make the coupling, not only without the aid of a stick, but with his left hand only, and in the attempt to

do so, his hand was caught and crushed between the couplings of the cars.

The witness Michie, who was the conductor of the train, testifies that as the plaintiff was going up the track to make the coupling, he warned him, when within five or six steps of him, to "be particular," saying at the same time that the coupling was a dangerous one to make. He also testifies that he has been in the employ of the company for a number of years as a freight conductor, and has never seen or known of a brakeman making, or attempting to make, a three-link coupling when the cars were in motion.

The witness Cosby testifies that while the rear section of the train was slowly approaching the first section, which was stationary on the main track, and had nearly reached it, he called the plaintiff's attention to the coupling of the flat-car, and cautioned him not to go between the cars. The witness was a brakeman on the rear section, and was standing, when he spoke to the plaintiff, on top of one of the moving cars. He says he spoke loud enough for the plaintiff to have heard him, though he made no reply.

The plaintiff, however, testifies that he did not hear the warnings, either of Michie or Cosby. And Dr. Anderson, who happened to be standing near by, and who went to the plaintiff's assistance when the accident occurred, testifies that they were unheard by him. But several witnesses, who were in no better position for hearing, swear positively that they distinctly heard the remarks of both Michie and Cosby.

At all events, the evidence shows that the dangerous condition of the coupling was obvious, and that the plaintiff, in violation of the rules of the company, voluntarily put himself in a position of danger, in consequence of which he was injured. Under these circumstances, in the eye of the law, he was the author of his own misfortune; that is to say, his negligence, or what is the same thing, his want of ordinary care and caution, was the proximate cause of the injury complained of. The action is therefore not maintainable; for, as was forcibly said by Judge Cooley, in *Michigan Central R. R. Co. v. Smithson*, 45 Mich. 212: "The best notice is that which a man must of necessity see, and which cannot confuse or mislead him; he needs no printed placard to announce a precipice when he stands before it." And by Mr. Justice Miller, in *Cunningham v. Chicago etc. R'y Co.*, 5 McCrary, 465: "A man has no right to thrust himself forward into a dangerous posi-

tion, and say, 'If I am hurt I shall go to the hospital and be taken care of, and recover damages.' He has got to take care of himself," etc.

The law undoubtedly imposes upon a railroad company the duty to observe due care in selecting competent servants, and in supplying and maintaining suitable and safe machinery, and a safe track: *Baltimore etc. R. R. Co. v. McKenzie*, 81 Va. 71; *Northern Pacific R. R. Co. v. Herbert*, 116 U.S. 642. It is not, however, the insurer of the safety of its employees. Its duty to them is discharged by the exercise of ordinary care; and by ordinary care is meant "such watchfulness, caution, and foresight as, under the all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise": *Wabash Railway Co. v. McDaniels*, 107 Id. 454. Hence, it is not required to change its machinery in order to apply every new invention or supposed improvement in appliance; and it may even have in use a machine or appliance for its operation, shown to be less safe than another in use, without being liable to its employees for the non-adoption of the improvement, provided that the employee be not deceived as to the degree of danger that he incurs: Wharton on Negligence, sec. 213; 2 Thompson on Negligence, 1019, sec. 24 (2); *Hough v. Railway Co.*, 100 U. S. 213; *Lovejoy v. Boston etc. R. R. Co.*, 125 Mass. 79; 28 Am. Rep. 206; *Michigan Central R. R. Co. v. Smithson*, *supra*.

There are also certain correlative duties on the part of the employee to the company. Of these, one is the duty of the employee to be reasonably observant of the machinery he operates, and to report any defects he may discover therein to the company. Another is to exercise ordinary care to avoid injuries to himself; for the company is under no greater obligation to care for his safety than he himself is. He must also obey the rules of the company prescribed for his safety, and which are brought to his knowledge. And he must inform himself, as far as he reasonably can, respecting the dangers as well as the duties incident to the service upon which he enters. It has accordingly been held in numerous cases, and the principle is elementary, that where the employee's willful disobedience of the company's rules is the proximate cause of the injury complained of, no recovery can be had of the company. And in general, any negligence of the employee, amounting to the want of ordinary

care, which is the proximate cause of the injury, will defeat an action against the company: *Clark's Adm'r v. Richmond etc. R. R. Co.*, 78 Va. 709; 49 Am. Rep. 394; *Sheeler's Adm'r v. Chesapeake etc. R. R. Co.*, 81 Va. 188; 59 Am. Rep. 654; *M. & C. R. R. Co. v. Thomas*, 51 Miss. 637; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Muldowney v. Illinois Central R'y Co.*, 39 Iowa, 615; *Lockwood v. Chicago etc. R. R. Co.*, 55 Wis. 50; *Toledo etc. R'y Co. v. Ashbury*, 84 Ill. 429; *Hathoway v. Michigan Central R. R. Co.*, 51 Mich. 253; 47 Am. Rep. 569; *Railroad Co. v. Jones*, 95 U. S. 439; *Tuttle v. Milwaukee R'y Co.*, 122 Id. 189.

This is decisive of the case before us. It is proper, however, to say that the evidence does not establish negligence on the part of the company. If the rules of the company are observed, the risks and perils of the service are not increased by the use of the three-link coupling; and if they were, in view of the frequency with which such couplings, in emergencies, are made, the danger incident to their use may well be considered as one of the ordinary perils, the risk of which, by his contract of service, the plaintiff assumed. He certainly had ample means of knowing that such couplings were often made by the company, and he is, therefore, affected with notice of the fact. It was his duty to have known it, if he did not; and the rule is well settled that where an employee has notice of extra hazards in the line of his employment, and continues in the service, without any promise on the part of the master to do any act to render the same less hazardous, it will be at his own peril; for the law presumes that he intended to assume them; otherwise he would have quit the service: *Clark's Adm'r v. Richmond and Danville R. R. Co.*, 78 Va. 709; 49 Am. Rep. 394; *Stafford v. Chicago etc. R. R. Co.*, 114 Ill. 244; *Hough v. R'y Co.*, 100 U. S. 213; *Tuttle v. Milwaukee R'y Co.*, 122 Id. 189.

For these reasons, we are of opinion that the circuit court did not err in setting aside the verdict of the jury and granting a new trial; nor afterwards, in giving final judgment for the defendant. The judgment is therefore affirmed.

Judgment affirmed.

PARTY PLEADING OVER AFTER DEMURRER HAS BEEN OVERRULED, WAIVES ALL OBJECTIONS to the ruling upon the demurrer: *Tabor v. Merchants' Nat. Bank*, 3 Am. St. Rep. 241.

SERVANT'S RIGHT TO RECOVERY OF DAMAGES FOR INJURIES CAUSED BY MASTER'S WANT OF CARE is barred by servant's contributory negligence:

See *Buzzell v. Laconia M. Co.*, 77 Am. Dec. 212, and note; as where the servant has placed himself in a dangerous position where he had no business to be: Note to *Chicago etc. R. R. Co. v. Swett*, 92 Id. 219.

DUTY OF MASTER TO SERVANT IS DISCHARGED BY THE EXERCISE OF ORDINARY CARE; he is not bound to protect the servant at all hazards by furnishing absolutely safe appliances, or by the adoption of every new invention: See notes to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 218-225; and *Chicago etc. R. R. Co. v. Swett*, 92 Id. 213-221; and also *Gutridge v. Missouri Pac. R'y Co.*, 4 Am. St. Rep. 392, and note. To the same effect are *Huhn v. Missouri Pac. R'y Co.*, 92 Mo. 440; and *Philadelphia etc. R. R. Co. v. Hughes*, 119 Pa. St. 301.

WHERE COUPLINGS BETWEEN RAILROAD CARS do not allow sufficient space for brakemen to stand in, or are otherwise visibly dangerous, the railroad company is not liable for an injury resulting from such defects: See *Kelly v. Abbott*, 53 Am. Rep. 292, and cases in note.

REDD v. DYER.

[83 VIRGINIA, 331.]

MAXIM CAVEAT EMPTOR STRICTLY APPLIES TO JUDICIAL SALES, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts, or fraud. But to entitle him to relief such mistake must be mutual, and where fraud or mistake is relied on by him, after the sale has been confirmed, it must be clearly and distinctly charged and proved.

PURCHASER AT JUDICIAL SALE, BY HIS CONTRACT OF PURCHASE, WAIVES ERROR OF COURT in decreeing the sale without ordering an account of liens to be first taken.

APPEAL. The opinion states the case.

Whittle and Anderson, and J. L. Anderson, for the appellants.

A. P. Staples, for the appellees.

RICHARDSON, J. The case is this: The female appellant was the purchaser of the house and lot in the proceedings mentioned, situate in the town of Martinsville. The sale was made under a decree of the circuit court of Henry County, in the suit of Dyer against Pharis, trustee, and others, and the terms of sale were duly complied with; that is to say, the required cash payment of \$100 was made, and two bonds were executed by the purchaser, with surety for the deferred payments of \$525 each, payable at six and twelve months from their date. The sale was made in August, 1883, and was duly reported to and confirmed by the court, without objection, at the following October term. And at the same term a receiver was appointed to collect the bonds as they should respectively become due.

At the October term, 1884, the receiver reported to the court that the purchaser was in default in respect of the second and last installment of the purchase-money, which fell due on the thirteenth of August, 1884; whereupon a rule was awarded against the purchaser and her surety, returnable to a later day of the same term, to show cause why a resale should not be ordered.

To this rule the purchaser, Mrs. Sallie H. Redd, and her husband, James S. Redd, who are the appellants here, filed their joint and several answer, in which they averred that when the property was exposed to sale, and before the sale was made, the commissioner, Pharis, who conducted the sale, made public proclamation that the title to the property was perfectly clear, "with the exception of the Calloway claim," and that with this understanding the purchase was made. They also averred that since the sale a claim to the property had been asserted by one William Martin and wife, who had retained counsel to recover it.

The answer then proceeds as follows: Your respondents are advised that a court of equity will not require purchasers at a judicial sale to pay out the purchase-money with a cloud upon the property. They therefore ask that a decree be entered directing "your respondents," within ninety days, to deposit the \$525, the last payment for said house and lot, over to the Henry County Bank, subject to any claim that the said William Martin and wife may establish against the property.

At the hearing, a decree was entered directing the property to be resold within a specified time, unless the balance of purchase-money then due, with interest, should be paid. The decree also directed the receiver, out of the fund to come into his hands, to pay certain debts, as directed by a decree in the cause made at the May term, 1883.

The balance of the purchase-money not having been paid within the specified time, the property was advertised to be resold; and thereupon, the said James S. Redd and Sallie, his wife, filed their bill in the said circuit court for an injunction to prevent the sale. They charged, as they had formerly done in their answer to the rule aforesaid, that the property, when sold, was represented by the commissioner to be unencumbered, and that the title to the same was perfect, "except as to the Calloway claim," and that upon this assurance the property was purchased. They also set forth in the bill, and in detail, the nature of the Martin claim, which, it was al-

leged, was in no way connected with the Calloway claim. They also complained of the provision in the decree ordering a resale, which directed the fund, when collected, to be distributed, averring that if the unpaid installment of purchase-money were paid and distributed as directed by that decree, the result would be, in the event the Martin claim were established, that the purchaser would not only lose the property, but the whole of the purchase-money besides. They also averred that they had put improvements on the property, amounting in value to fourteen hundred dollars. And the prayer of the bill was, that the Martin claim be adjudicated and determined, that the sale be enjoined, and for general relief.

The injunction was awarded as prayed for. The defendant Pharis, "receiver and special commissioner," demurred to the bill, and also answered. He denied that when the sale was made he represented the title to the property to be good, except as to the Calloway claim, as charged in the bill; and he denied that any further statement was made in connection with the title than the public announcement by the crier on the day of sale that "the property was involved in the suit of Calloway's committee against Hairston's heirs," for which reason, he averred, he recommended the confirmation of the sale at the very low price of \$1,150. As to the Martin claim, he averred that he knew nothing, and that the objection of the plaintiffs on that ground, as a defense to the payment of the unpaid purchase-money, had been passed upon by the court when set up in their answer to the rule aforesaid.

The said William Martin and Susan, his wife, and their children, who were made defendants, filed their answer to the bill, which they prayed to be taken as a cross-bill, in which they charged that the said Susan Martin had a fee-simple title to the property in question, and was entitled to recover the same upon the grounds set forth in the answer.

The two causes were heard together, and at the October term, 1885, the decree complained of was entered. In the cause of Redd and wife against Pharis, commissioner, etc., the injunction was dissolved, and the bill dismissed, without prejudice, however, to the defendant Susan Martin to assert in a separate suit any claim to the property that she might be advised to assert. And in the cause of Dyer against Pharis, trustee, and others, the property was again ordered to be resold, unless within thirty days from the rising of the court the

unpaid balance of purchase-money should be paid, the terms of sale being the same as those prescribed by the decree of October term, 1884, above referred to. From this decree Redd and wife applied for and obtained an appeal and *supersedeas* from one of the judges of this court.

It is contended on behalf of the appellants that the Martin claim ought to have been passed upon and settled before the property was ordered to be resold, and that in failing to do so the circuit court erred. There is no merit, however, in this objection. It is based upon the idea that if the claim be valid, the title to the property is defective, and that relief should be decreed the purchaser accordingly. This is not in accordance with the settled doctrine relating to judicial sales in this state. There is perhaps no principle in our jurisprudence more firmly established by repeated decisions of this court than that the maxim *caveat emptor* strictly applies to judicial sales.

The rule is well settled in *Long v. Weller's Ex'r*, 29 Gratt. 347, where it is said: "The court undertakes to sell only the title, such as it is, of the parties to the suit, and it is the duty of the purchaser to ascertain for himself whether the title of these parties may not be impeached or superseded by some other and paramount title; and if he have just grounds of objection for want or defect of title, he should present them to the court before the confirmation of the report of sale." The court in that case referred to numerous cases to the same effect, to which may be added the case of *Hickson v. Rucker*, 77 Va. 138, and other later cases.

This doctrine is of course subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts or fraud. But the mistake must be mutual; for the mistake of one of the parties occasioned by his own culpable negligence does not entitle him to relief as against the other, who is free from negligence: *Long v. Weller's Ex'r*, *supra*. And it is scarcely necessary to say that where fraud or mistake is relied on by a purchaser, after the sale has been confirmed, it must be clearly and distinctly charged and proved: *Hord's Adm'r v. Colbert*, 28 Gratt. 49; *Gregory v. Peoples*, 80 Va. 355.

The application of these principles is decisive of the present case. Here fraud is not alleged, nor even insinuated; and if there was any mistake at all in respect to the purchase, it was certainly not mutual, nor is it so charged. The allegation in the appellant's bill that the title was represented by the com-

missioner of sale to be perfect, "except as to the Calloway claim," is distinctly denied in his answer to the bill, and there is no proof whatever on the subject. In short, the case of the appellants, in substance, simply amounts to an allegation that the title to the property is defective; and even if the allegation be true, the alleged defect existed before the sale was made. Clearly, then, they have not been prejudiced by the decree of which they complain.

It is further contended, however, that the circuit court erred in decreeing a resale of the property without first having ordered an account of liens to be taken. It is undoubtedly a well-settled general rule that in a suit to subject real estate to the satisfaction of debts, it is premature and erroneous to decree a sale before an account is taken ascertaining the liens on the land, their amounts, and priorities. But does this rule apply to the present case? We are of opinion it does not. No objection on this ground was made by the purchaser before the sale was made, and we are of opinion it is too late for the appellants to raise the objection for the first time in the appellate court, and after the land has been decreed to be resold, if even it could have been made before the decree of resale. The object of the resale is simply to enforce the contract into which the purchaser entered when the sale was made and confirmed; and if the court erred in originally decreeing a sale without ordering an account of liens to be taken, such error was waived, so far as the purchaser was concerned, by her contract of purchase. The land was bought *cum onere*, at a stipulated price, and she clearly has no right to delay the suit by having the case sent back for an account to be taken. She bought and got all that the court undertook to sell. If, even to her detriment, she chose in the first instance to proceed in the dark, she has nobody to blame but herself, and she must abide the consequences of her own act.

Objection is also made to the decree on the ground that it directs a distribution of the purchase-money in default before the resale, if one is made. This was true in respect to the decree of October term, 1884, directing a resale; but no such objectionable provision is contained in the decree of October term, 1885, from which this appeal is taken.

For these reasons, we are of opinion that there is no error in the decree appealed from, and that the same must be affirmed.

Decree affirmed.

MAXIM CAVEAT EMPTOR APPLIES TO JUDICIAL SALES: See *Webster v. Haworth*, 68 Am. Dec. 287, and *Smith v. Northam*, 82 Va. 937, where the same proposition that is stated in the first *syllabus* is laid down; and see also the note to *Burns v. Hamilton*, 70 Am. Dec. 572-586, where this topic is fully discussed.

ANTHONY v. KASEY.

[83 VIRGINIA, 338.]

DEPARTURE OF COURT FROM ESTABLISHED MODES OF PROCEDURE RENDERS ITS JUDGMENTS VOID, even though it may have jurisdiction both of the subject-matter and of the parties. A court, though possessing such jurisdiction, is still limited in its modes of procedure, and in the extent and character of its judgments.

PERSONAL DECREE AGAINST SURETY ON BOND OF PURCHASER AT JUDICIAL SALE IS VOID, where it is rendered upon a rule against him and his surety, upon the latter's failure to pay.

APPEAL. The opinion states the case

Griffin and Lowry, for the appellants.

Burks and Burks, for the appellees.

HINTON, J. In the brief of the appellees we find the following succinct statement of facts, which are all that are necessary for a correct understanding of the question to be decided in this case: Under a decree in the case of "Allen and others against Anthony and others," lately pending in the circuit court of Bedford County, a tract of land was sold on a credit, and the appellee, John G. Kasey, became one of the sureties on the bonds of the purchaser for the price, the title to the land being retained as a further security. The sale was reported and confirmed by the court. The purchaser making default, on a rule against him, the land was resold under decree in the cause, the price at the second sale being much less than at the first; whereupon a further rule was made, not only against the purchaser, but also against his sureties, to show cause why a decree should not go against them for the difference between the prices at the two sales. Upon service of the rule, Kasey not answering nor appearing, a personal decree was made against him and the others for the unpaid balance of purchase-money on the first sale. The decree was never satisfied, and the case in which it was rendered has long since

ended. Kasey was not a party to that suit, unless his being a surety for the purchase-money made him a party.

In a suit subsequently brought by creditors to subject the lands of Kasey to their debts, the appellants, in whose behalf the decree had been made, claimed a lien on the lands by virtue of their decree; and the commissioner, to whom the same was referred for an account, reported in their favor. Kasey and Quarles (the lands having been conveyed to the latter in trust) excepted to the report on the ground that the decree of the appellants, reported as a lien, was null and void, and therefore constituted no lien on the lands.

At the hearing this exception was sustained; and from so much of the decree as sustained it, the present appeal was allowed.

It thus appears that the sole question which the court has to determine, and it is one of considerable importance in practice, is, whether the court has jurisdiction to render said decree against the defendant, John G. Kasey, who was a surety of the purchaser. For if it did, no matter how erroneous that decree may be, it cannot be collaterally assailed with success; whereas, if the court had no jurisdiction to proceed in this summary way by rule against the surety, the decree is not merely erroneous, but absolutely void, and may be treated as a nullity in any case where its validity is called in question. "A void judgment," says Mr. Freeman, "is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void": Freeman on Judgments, sec. 117; *Wade v. Hancock*, 76 Va. 626; *Dewing v. Perdicaries*, 96 U. S. 196; *Oliver v. Houndlett*, 13 Mass. 239; 7 Am. Dec. 134.

Now, it is essential to the validity of a judgment or decree that the court rendering it shall have jurisdiction of both the subject-matter and parties. But this is not all, for both of these essentials may exist and still the judgment or decree may be void, because the character of the judgment was not such as the court had the power to render, or because the mode of procedure employed by the court was such as it might not lawfully adopt. On this subject Mr. Justice Field has this pertinent observation: "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure and in the

extent and character of its judgments. . . . A departure from established modes of procedure will often render the judgment void": *Windsor v. McVeigh*, 93 U. S. 282, 283. Of this many illustrations might be given, but we give only two or three taken from the brief of counsel. The circuit courts of the state have jurisdiction to enforce the collection of debts according to an established procedure. A holds the bond of B for one thousand dollars, due and unpaid. He goes into a circuit court with the bond in his hand, and, without writ issued or any pleadings, asks the court to award a rule against B to show cause why judgment should not be rendered against him for the debt and interest. The rule is accordingly awarded, executed, and returned, and judgment thereupon rendered for the debt, interest, and costs. Such a judgment would be void, notwithstanding the court has jurisdiction of the subject and of the parties. Why void? Because, in the language of Mr. Justice Field, "the court is not authorized to exert its power in that way."

Again: "The circuit court of the United States, in the suit instituted therein to wind up the affairs of the Valley Bank, had jurisdiction for the collection and application of the assets of the bank; it had jurisdiction of the subject-matter and presence of the parties to be affected by its judgment"; yet the judgments it rendered on certain proceedings had in the cause were afterwards, in the case of *Nulton v. Isaacs*, 30 Gratt. 740, declared void. Why? Because the court had exerted its power in a way not warranted by the law.

And so in *Thurman v. Morgan*, 79 Va. 367, a case not unlike the present, the circuit court had jurisdiction of the subject, and the parties against whom the decree was rendered were brought before the court; yet the decree was declared by this court to be void. Why? Because, though the sureties of the receiver may have been liable for his default, the circuit court had no power under the law to proceed against them in that cause according to the method adopted. They were not parties to the cause, and the procedure by rule to bring them in and subject them for liability as sureties on the bond of the receiver, though he was an officer of the court, was against every sound principle of jurisprudence, and without any recognized precedent.

It seems difficult to distinguish this last-mentioned case from the one at bar. In each of them the proceeding was against sureties, who were not parties to the suit in which the

proceeding was had, unless made so by being on the bonds, and in both cases the proceeding was by rule. Yet in that case this court held that the proceeding by rule was such a departure from the established mode of procedure as to render the decree not only erroneous, but void.

In *Clarkson v. Read*, 15 Gratt. 288, this court held that the purchaser was a party to the suit as to all matters appertaining to the purchase, and might therefore be proceeded against by rule in case of default. But no such reason exists, in our opinion, for such a summary procedure against a surety. He does not deal directly with the court, and so become a party to the suit. His undertaking is collateral to the contract of purchase. It is that of a mere surety, and cannot be extended by construction in any respect. And to use the language of this court in *Thurman v. Morgan*, 79 Va. 367, "Their liability, if any, grows out of their undertaking as sureties on the bond, and can be ascertained and enforced only by suit on the bond in a common-law court, where full opportunity for making defense and the constitutional right of trial by jury can be had."

Even in the case of a purchaser the proceeding by rule is against him in his capacity of purchaser, and so as a party to the suit, and not upon the bond, which is a mere legal security for the payment of the purchase-money, enforceable only in a legal forum according to the established mode of procedure in that forum. This is clearly shown by the case of *Clarkson v. Read*, 15 Gratt. 288. This reason is wanting in the case of the surety, and we can perceive none other to justify such a summary proceeding against him. The result is, that the decree appealed from is right, and must be affirmed.

Decree affirmed.

DEPARTURE FROM ESTABLISHED MODES OF PROCEDURE BY COURT HAVING JURISDICTION of person and subject-matter avoids judgment when: See Freeman on Judgments, sec. 118, and cases cited. Decree may be void because court has exceeded its jurisdiction in the progress of the cause: See *Seamster v. Blackstock*, ante, p. 262.

CLARK v. CITY OF RICHMOND.

[83 VIRGINIA, 355.]

MUNICIPAL CORPORATION IS LIABLE FOR INJURIES SUSTAINED BY REASON OF ITS NEGLIGENCE to keep its streets in proper and safe condition, where it has by its charter the power to lay out, improve, light, and keep its streets in order.

MUNICIPAL CORPORATION IS LIABLE FOR PERMITTING EXCAVATION TO REMAIN UNFENCED, or without proper guards, in such close proximity to the highway that one rightfully using it may, without any fault on his part, but as the result of an unintentional deviation or an accidental misstep, sustain injury by falling into such excavation. But it is not liable where, in order to reach the place of danger, the party injured must become an intruder or trespasser upon the premises of another.

MUNICIPAL CORPORATION IS NOT LIABLE FOR LEAVING PLACE ALLURING TO CHILDREN exposed without barriers, when such place can only be reached by leaving the highway and trespassing upon the premises of another. Its duty does not extend to the protection of children against every sudden freak that may possess them.

TORT. The opinion states the case.

W. W. and B. T. Crump, for the plaintiff in error.

C. V. Meredith, for the defendant in error.

HINTON, J. This is an action of tort brought by Frank A. Clark, an infant of tender years, who sues by his next friend, against the city of Richmond, to recover damages for injuries sustained by him in falling into an open area, which, it is charged, the city allowed to remain without a sufficient barrier.

There was a demurrer to the declaration, and each count thereof, which being overruled, the parties went to trial, when the jury found a verdict for the defendant.

The plaintiff now complains that the court erred to his prejudice in refusing to give certain instructions asked for by him, and in giving the instruction which it gave.

The bill of exceptions—and there is only one in the case—does not contain all the evidence given at the trial, but enough of it to exhibit, in the estimation of the plaintiff, the relevancy of the instructions asked for by him to the facts of the case. Yet meager as this statement of the evidence is, it is sufficiently full to disclose the fact that the plaintiff can, in no event, be entitled to recover. Without, therefore, stopping to consider the action of the court in the matter of the instructions, and assuming, for the purposes of the argument, that the *gravamen* of the plaintiff's complaint has been fully es-

tablished, I shall proceed to state, as briefly as possible, the grounds upon which this opinion rests.

It appears from the bill of exceptions that the city of Richmond had been engaged, for several months prior to the date of the accident, in elevating the grade of Fourth Street between Byrd and Canal streets, and that this work was nearly completed on the 1st of October, 1883. About which time, the owner of four tenement houses fronting on Fourth Street, and adjoining the corner of Byrd Street, determined that he would at the same time enlarge an area in front of his houses, which was then three feet wide and several feet deep. As the city wished to utilize the earth to be obtained from the new area, the digging, by agreement, was done by the city hands as a part of the work on the street. On the area thus enlarged, the owner, one Truman A. Parker, constructed along the line of this sidewalk a substantial brick wall, and surmounted the same with a granite coping. The top of the coping was at least fifteen inches—and probably over two feet—above the general level of the sidewalk. Such being the condition of the area on the morning of the accident, the plaintiff, a child six years of age, but small of stature (not being above three feet high at most), who had been sent on an errand, came up this sidewalk, using the walk-way until near the end of the square, when, of his own motion, he got on top of the wall, and while standing or walking thereon, fell into the area, thereby sustaining the injuries for which he sues.

Is there a right of recovery in such a case? It is well settled in this state that a municipal corporation which has, by its charter, the power to lay out, improve, light, and keep its streets in order, is liable in damages to any person who may sustain injuries by reason of the neglect of such corporation to keep its streets in a proper and safe condition. In such cases, the duty of the corporation to repair, and its liability for injuries caused by defective streets, is deduced from the special and exclusive powers conferred upon the corporation with respect to its streets, and from the means which, by taxation and local assessments, the law places at its disposal to enable it to discharge this duty: *Noble v. City of Richmond*, 31 Gratt. 275; 31 Am. Rep. 726; 2 Dillon on Municipal Corporations, sec. 789. And it is equally well settled that where the corporation permits an excavation to remain unfenced, or without proper guards, in such close proximity to the highway

as that one rightfully using it may, without any fault on his part, but as the result of an unintentional deviation or an accidental misstep, sustain injury by falling into such excavation, such corporation or city will be also liable: *Coupland v. Hardingham*, 3 Camp. 398; *Jarvis v. Dean*, 11 J. B. Moore, 354; *Barnes v. Ward*, 67 Eng. Com. L. 400; *Zettler v. City of Atlanta*, 66 Ga. 195; *Bassell v. City of St. Joseph*, 53 Mo. 299; 14 Am. Rep. 446. But in these cases, in order to render the corporation liable for injuries occasioned by such excavation, the excavation must substantially adjoin the highway, so that one making a false step, or affected by sudden giddiness, might be thrown in the excavation: *Hardcastle v. South Yorkshire R. R. Co.*, 4 Hurl. & N. 67; *Binks v. South Yorkshire R. R. Co.*, 113 Eng. Com. L. 242; *Hadley v. Taylor*, L. R. 1 Com. P. 54. But if, in order to reach the place of danger, the party injured must become an intruder or trespasser upon the premises of another, the case will be different, for in such case there is no breach of duty from which the liability to respond in damages can result. From what has been said, it is perfectly obvious that the present case does not fall within the principle announced above; for here the wall and coping may be said to have furnished the plaintiff an ample barrier so long as he was using the sidewalk for purposes of travel.

It is equally impossible to maintain the liability of the corporation upon the second ground suggested by the plaintiff's counsel, namely, that it was negligence in the corporation to have a place so enticing and alluring to children thus exposed without barriers. The obligation of municipal corporations to erect barriers around areas adjoining or extending into its sidewalks or highways grows out of the duty which rests upon municipal corporations to maintain their streets and sidewalks in safe condition for those who may be rightfully using them, whether they be grown persons or children; but this duty cannot be held to extend to the protection of children against every sudden freak that may possess them. Corporations have indeed been held, in some instances, liable for a failure to adopt suitable precautions and safeguards to protect children against turn-tables and dangerous machines which they have permitted to remain sufficiently near their streets and sidewalks to allure and entice children into using them to their hurt; but no case, so far as we are aware, has gone to the extent of holding a municipal corporation liable in damages to a child who had left the street or highway and suffered

an injury as a consequence of his having climbed upon a structure entirely without its traveled limits, and fallen therefrom: *Railroad Co. v. Stout*, 17 Wall. 657; *Keffe v. M. & St. P. R'y Co.*, 21 Minn. 207; 18 Am. Rep. 393; *K. C. R'y Co. v. Fitzsimmons*, 22 Kan. 690; 31 Am. Rep. 203.

The same reasons which would warrant us in holding the defendant liable here would authorize us to hold a corporation liable for an injury suffered by a child who had climbed upon a building in process of construction without the highway, and sustained injuries in falling therefrom.

We are of opinion that there is no liability upon the defendant in this case, and this makes it unnecessary for us to consider whether the court erred in refusing the instructions asked by the plaintiff.

It follows also that the plaintiff was not entitled even to the instruction given by the court, and that he could not therefore have been prejudiced thereby.

The judgment of the court below is right, and must be affirmed.

Judgment affirmed.

MUNICIPAL CORPORATION IS LIABLE FOR INJURIES FROM NEGLIGENCE TO KEEP HIGHWAYS IN REPAIR: See *Turner v. Newburgh*, 4 Am. St. Rep. 453, and note; *Atlanta v. Buchanan*, 76 Ga. 585; *Brennan v. St. Louis*, 92 Mo. 482.

CITY IS NOT BOUND TO FENCE HIGHWAY TO PREVENT TRAVELERS FROM STRAYING out of it, if there is no unsafe place immediately contiguous to the way: *Sparhawk v. Salem*, 75 Am. Dec. 700; but the city would be held grossly derelict if it constructed a passage-way on the border of an embankment, and provided no sufficient guards: *Joliet v. Verley*, 85 Id. 342.

RORER IRON COMPANY v. TROUT

[83 VIRGINIA, 397.]

COURTS OF EQUITY CANCEL CONTRACTS FOR FALSE REPRESENTATIONS OF MATERIAL FACTS which constitute an inducement to the contract, and upon which the party had a right to rely, especially where such representations are of matters peculiarly within the knowledge of the party who makes them.

MATTER OF OPINION MAY AMOUNT TO AFFIRMATION, AND BE INDUCEMENT to a contract, especially where the parties are not dealing on equal terms, and one of them has, or is presumed to have, means of information not equally open to the other.

REPRESENTATIONS ARE NOT OF SUCH MATTERS OF OPINION AS GO FOR NOTHING, though untrue, where they are made by parties who go to the owners of a mine, and, to induce them to execute a lease thereof, represent that they have the means at hand for successfully working a force capable of mining and transporting a very large quantity of ore daily, and promise to commence operations in sixty days.

LESSEE OF MINE HAS NO OPTION TO WORK OR NOT TO WORK IT for an indefinite time, where the rent reserved to the lessor is a royalty of so much per ton on the ore taken out.

ESTOPPEL IN PAIS IS ONE THAT ARISES FROM ACTS, conduct, or declarations of a person, by which he designedly induces another to alter his position injuriously to himself. But an agreement relied on as an estoppel must be executed, and not merely executory.

EXCLUSION OF TESTIMONY, ADMISSION OF WHICH COULD NOT HAVE AFFECTED RESULT, is not ground for reversal of a decree.

DEFENDANT WHO WOULD AVAIL HIMSELF OF DEFENSE OF PURCHASER FOR VALUE without notice must put it in issue by his pleadings; otherwise the court cannot consider and allow it, although the evidence may show that he could have maintained that defense had he set it up by his plea, or by his answer.

DEFENDANT CLAIMING TO BE PURCHASER FOR VALUE WITHOUT NOTICE MUST EXPRESSLY DENY NOTICE in his plea or answer, though it is not charged in the bill.

WHATEVER PUTS PURCHASER ON INQUIRY IS EQUIVALENT TO NOTICE. And possession of the property by a person other than the vendor is sufficient to put a purchaser on inquiry, and to affect him with knowledge of the claims of the possessor.

COURT IS BOUND TO CONFINE ITS DECREE TO CASE MADE BY PLEADINGS.

BILL in equity. The opinion states the case.

Penn and Cocke, for the appellants.

G. W. and L. C. Hansbrough, for the appellees.

RICHARDSON, J. This is an appeal from a decree of the circuit court of Roanoke County, rendered March 28, 1885, in the chancery cause, wherein Jacob M. Trout and wife were complainants, and A. Lewis, M. P. Preston, E. G. McClanahan, J.

C. Green, F. J. Chapman, F. Rorer, S. Coit, and Rorer Iron Company, defendants.

The suit was instituted August 25, 1882, against the two first-named defendants only, the others having been made parties afterwards on the petition of said defendant company. The object of the suit was to annul a deed of lease executed by said Trout and wife on the 29th of April, 1881, granting to said A. Lewis and M. P. Preston the privilege for twenty years to mine and haul off all iron and other minerals on their tract of land, the lessees to pay ten cents a ton for all minerals obtained from the premises, and to commence developing in sixty days from the date of the lease. The bill avers, as grounds for such annulment, that the lessees, in order to induce the complainants to execute the lease, made to them certain representations which were material, and which were relied on by the complainants as true, but which were false, and thereby procured the lease; that the representations were, that certain things existed, the existence whereof was a matter peculiarly within the lessees' knowledge; that these things were, that the lessees were about to engage on a large scale in the business of mining, transporting to market, and selling iron ores; that they had made, or were about making, extensive preparations; that they intended to set to work to mine complainants' ores a large force, and employ as many as twenty wagons to haul the ore; that their preparations or means would enable them to transport and ship as much as from one hundred to five hundred tons per day; that they would develop in sixty days, and go to mining and hauling directly afterwards; and that the bonus of ten cents a ton, which they would allow him, would yield complainant an income of at least ten dollars a day, which he might draw every night, if he chose.

The record discloses the fact that said representations were made by Lewis in the presence of Preston, at the house of the complainants, on the 29th of April, 1881, just preceding the drawing and signing of the deed of lease. The alleged representations were deposed to by the complainant, Jacob M. Trout, and by his daughters, Mrs. Engleman and Miss Laura Trout, all of whom substantially agree; and their statement is supported in an important particular by George Wertz, who deposed that Lewis told him that he, Lewis, had to commence delivering ore from complainants' land within sixty or ninety days.

Preston, in his own deposition, said that he made no such statements; that he was writing at the time the conversation was going on between Lewis and the complainants, and paid no attention to it. Yet, in his answer to the bill, he denied its averments as to those representations. On the contrary, Lewis, who is alleged to have made the representations, did not answer the bill, but let it go for confessed as to himself. Nevertheless, he gave his deposition, in which he denied those averments, yet admitted that during most of the time he was at complainants' house Mrs. Engleman and her sister were in the porch, close enough to hear the conversation. It is in evidence, and not denied, that the lessees had made no such preparations, and had no such means to mine, transport, and market the minerals, and that they did not mine or attempt to mine any ores on the complainants' land, or pay him any such bonus at any time before the institution of this suit, nor any one else for them.

It appears from the record that by deed of October 21, 1881, Lewis and Preston exchanged one undivided fourth of the Trout lease and of six other leases upon adjacent lands, with E. G. McClanahan, for two thirds of fifty acres of mineral lands also adjacent; and that by deed of same date they then conveyed one undivided fourth of the seven leases and fifty acres of mineral land to F. J. Chapman and J. C. Green; and that by deed of July 4, 1882, Lewis conveyed his remaining fourth interest in those leases and land, and other lands, to F. Rorer.

It also appears that on the 2d of September, 1882, Chapman and Rorer, knowing of this suit, got J. M. Trout to promise, as they say, "to dismiss" this suit, and to sign a note addressed to his own counsel, directing him "to dismiss" it, and stating it had been "satisfactorily settled," and gave J. M. Trout an order on McClanahan, who was absent, for fifty dollars, which note was delivered, yet the suit was not dismissed, but only continued; and which order was never presented for payment, nor paid, but was returned. J. M. Trout says he only promised "to continue the suit till the next spring," and signed no contract of any sort, and received no money, and merely signed, without reading, a note to his own counsel, who had the suit continued with his approbation; and that he returned the order without attempting to collect it. The note, however, did not literally direct the counsel either to dismiss or to continue the suit, but did direct him

“to stop the proceedings,” and did state that the suit had been “satisfactorily settled,” and was handed to the counsel by Mr. Ballard, who, it seems, was acting as attorney for Chapman and others, and was practicing in said circuit court, and their counsel in this cause. It does not appear that at the ensuing term any motion was made to dismiss this suit, or that any opposition was offered to its continuance.

It also appears, by deed dated the 9th of September, 1882, but not recorded until the 5th of October of that year, that Preston, McClanahan, Chapman, Green, and Rorer conveyed the said seven leases (including the Trout lease here in question), and the said fifty acres of mineral land, and other lands and leases, to one Samuel Coit. All of these parties knew of the pendency and purpose of this suit, and knew, or had opportunity to know, that it had not been dismissed; though it is not disclosed by the record that it was proved or even alleged that Coit was present, or that his name was mentioned at the transaction of the 2d of September, 1882, or that Trout’s note to his counsel was ever exhibited to Coit, or that Trout had ever seen or heard of him before he received the said conveyance. And lastly, it appears that by deed of January 18, 1883, Coit conveyed the said leases and mineral lands to the Rorer Iron Company.

At the April term, 1883, this corporation filed its petition in this suit. It recited the Trout lease of April 29, 1881, and the several successive alienations, whereby it became sole owner. It stated that after this suit was brought, J. M. Trout had, for fifty dollars then and there paid, promised McClanahan and his co-tenants to dismiss the suit; and by an order, signed by him, had directed his counsel to dismiss it,—of all of which the corporation claimed to have had notice before the conveyance of the 18th of January, 1883, and relied on such promise as an estoppel to this suit. The petition then prayed that said corporation and the intermediate alienees be made parties, and that J. M. Trout “be specially required to state if the allegations of the petition in reference to the dismissal of this suit are true.”

To this petition J. M. Trout filed his answer, to which the corporation replied generally. In response to the special inquiry, J. M. Trout pronounced the allegations in reference to the dismissal of this suit untrue, and repeated his statement as already given. Accordingly, the bill was amended by this addition: “And by direction of the court, the Rorer Iron Com-

pany, F. J. Chapman, E. G. McClanahan, J. C. Green, F. Rorer, and Samel Coit are made parties to this bill, and are charged with acquiring the said lease, subject to all the infirmities of the title thereto of the original lessees, Lewis and Preston, and are required to answer the same in solemn form."

The company filed its demurrer, which was overruled, and also its answer denying the alleged misrepresentations of Lewis and Preston, whereby, the bill averred, they had procured the Trout lease, and gave their account of the circumstances attending the execution of that lease. But the answer did not set out the successive alienations whereby it became sole owner of said lease. But the company gave its narrative of the transaction of September 2, 1882, and relied on it as an estoppel to this suit. And in giving that narrative, the company merely mentioned that McClanahan, Green, Chapman, and Rorer had purchased the Trout lease, Preston still retaining an interest therein, and proceeded to say that "a short time thereafter" Coit, being informed that this suit had been compromised and settled, and being informed of the terms, had purchased, on the 5th of October, 1882, the interests of McClanahan and others in said lease, and that subsequently the Rorer Iron Company, relying on the same assurances of compromise, purchased the said interest. It did not claim that it was a purchaser for value without notice, nor that its immediate grantor was such purchaser, nor that his grantors were such purchasers. In a word, the company did not set up the defense of "purchaser for value without notice." It even failed to allege any connection between McClanahan, Chapman, and Green with Lewis and Preston. Nor did it allege that either of the complainants gave Coit the information or the company assurances that this suit had been or would be compromised and settled.

At the October term, 1884, there was filed what purports to be the joint and several answer of Rorer, McClanahan, Chapman, and Green; but it was signed and sworn to only by the three first, and not by Green. This answer does not deny that the respondents had knowledge that from the date of the recorded lease of April 29, 1881, up to and far beyond the dates of the conveyances to them, no ore had been mined on Trout's land under that lease,—a fact elsewhere proved and admitted. They do aver that they were purchasers for value without notice of the matters alleged in the bill; yet they do

not allege that at the date of the conveyances to them, their grantors, Lewis and Preston, were in possession of the premises conveyed; but they claim to have paid the purchase-money, though it was proved, and admitted elsewhere that Rorer's part had not been paid. Nor do they allude to Coit or to the Rorer Iron Company in any way whatever, either as their alienees or in any other character. And they do not refer to the alleged promise of J. M. Trout to dismiss this suit, or to any other ground of estoppel to its prosecution.

As late as February 28, 1885, and just before this cause was heard in vacation, Samuel Coit's counsel, with the consent of the complainants' counsel, filed his unsworn answer, relying in general terms upon the facts set forth in the answer of the Rorer Iron Company and of McClanahan and others, and waiving the service of process. But he was not examined as a witness in the cause, nor did he appeal from the decree therein. Lewis and Preston were examined only as to what occurred about the execution of the lease, and they were objected to as incompetent to testify; J. M. Trout, the other party to the transaction, having been objected to as incompetent, his wife being a party to the suit and interested.

McClanahan deposed that he never paid, but would have paid, the order drawn on him for fifty dollars had it been presented; that the Rorer Iron Company commenced to build their line of railroad from the Norfolk and Western Railroad to their mines, a distance of five and a half miles, in January, 1882; that it does not touch the complainants' land; and that no ore was mined on said land until the 8th of November, 1883, the day next before the day on which he testified, when one load was taken out. J. H. Sykes testified that the railroad was commenced in October, 1882. F. Rorer, P. H. Rorer, and Chapman in his first deposition, testified only as to the transaction of September 2, 1882, with J. M. Trout, who was objected to as incompetent, and Chapman and F. Rorer, being parties to the transaction and to the suit, were also objected to as incompetent. But Chapman deposed a second time, and as late as the 28th of February, 1885, and said that McClanahan had delivered possession of the fifty acres of land, which, by the deed of the 21st of October, 1881, he had exchanged with Lewis and Preston for one undivided fourth of the said leases, and that he (Chapman) had paid the entire purchase-money for said undivided fourth, which by deed of the same date those three had conveyed to Green and himself,

before notice of the complaints of fraud against the lessees, Lewis and Preston. But this witness also testified, and it was admitted by the company's counsel, that F. Rorer had never paid the entire purchase-money to Lewis for the one undivided fourth conveyed to him by the deed of the 4th of July, 1882; and that Samuel Coit had never paid the entire purchase-money for the said leases and land conveyed to him by McClanahan and others by the deed of September 9, 1882. Nor was it proved that the Rorer Iron Company had paid the entire purchase-money to Coit for the leases and lands aforesaid, which he conveyed to said company by the deed of the 18th of January, 1883.

In vacation, on the 28th of March, 1885, the said circuit court pronounced the decree complained of, whereby it was held that "the lease which was executed by the complainants the 29th of April, 1881, devising to the defendants Lewis and Preston a certain tract of 391 acres, more or less, of land for the term of twenty years, be and the same hereby is canceled, except as to the one undivided half thereof which passed through the hands of F. J. Chapman, J. C. Green, and E. G. McClanahan, who were *bona fide* purchasers for valuable consideration without notice of defect of said half-interest, into the hands of the defendant Samuel Coit, and thence into the hands of the defendant, the Rorer Iron Company; also that the complainants recover of the defendants, the Rorer Iron Company, Samuel Coit, F. Rorer, A. Lewis, and M. P. Preston, their costs by them about the prosecution of their suit in this behalf expended; and that the defendants F. J. Chapman, J. C. Green, and E. G. McClanahan recover of the complainants their costs by them about their defense in this behalf expended.

"Before the hearing of the cause and rendition of said decree, the defendants excepted to the competency of the complainant, Jacob M. Trout, as a witness in the cause, for the reason that his wife was a party to this suit; and the complainants excepted to the competency of the defendants, F. J. Chapman, F. Rorer, M. P. Preston, and A. Lewis; and the court sustained the exceptions to the competency of J. M. Trout or wife to testify in the cause, and also excluded the testimony of Lewis, Preston, F. Rorer, and F. J. Chapman, so far as they testified to transactions between the complainants and themselves; but the court heard and decided the case upon all the other evidence in the record."

From said decree of March 28, 1885, the Rorer Iron Company alone applied for and obtained an appeal and *supersedeas*.

1. The first assignment of error is, that the bill attempts to set up a contemporaneous parol agreement, essentially different from and in conflict with the written agreement which was signed and sealed by the parties, for which reason it is insisted the demurrer should have been sustained.

This assignment is clearly founded on a misconception, and is wholly untenable. The bill does not set up a different agreement from that contained in the deed of lease, but avers that the deed of lease was itself procured by fraudulent misrepresentations. These representations were of material things well calculated to, and doubtless did, induce the complainants to execute the lease to Lewis and Preston, thereby seriously encumbering a very valuable property without any corresponding benefit to the lessors. The false representations thus made by the lessees, and by means of which an unconscionable advantage was taken of the lessors, were of matters peculiarly within the knowledge of the lessees, and on which the lessors relied and acted, as they had the right to do; and they were deceived and injured by them, because they were false. These false representations were not held out as opinions merely, but were positive affirmations especially adapted to the end in view, which was to obtain the lease of the mining privileges aforesaid. By these means they obtained the deed of lease, but the lessors got nothing in return. And it is on this ground that the suit was brought to annul the deed. It is of everyday occurrence that courts of equity cancel contracts on such grounds: See 1 Story's Eq. Jur., sec. 193, note; *Smith v. Richards*, 13 Pet. 26; Adams's Eq., p. 177; 2 Parsons on Contracts, 177; *Grimm v. Byrd*, 32 Gratt. 302; *Linhart v. Foreman*, 77 Va. 540. In the last-named case, at page 545, Hinton, J., said: "It is not necessary that the misrepresentation should be the sole cause of the transaction; it is enough that it may have constituted a material inducement." And in *Low v. Trundle*, 78 Va. 65, the same judge said: "If one represents as true what is false, in such a way as to induce a reasonable man to believe it, and the representation is meant to be acted upon, and he to whom the representation is made, believing it to be true, acts on it, and thereby sustains damage, there is ground to support an action of deceit at law, and to found a rescission of the transaction in equity."

It matters not whether the party making the representation knew it to be false or not, so the other party relied and acted on it, as he had a right to do, without further inquiry: *Brown v. Rice*, 26 Gratt. 473; *McMullen v. Saunders*, 79 Va. 356.

2. It is assigned for error that "the bill should have been dismissed at the hearing upon the complainants' own testimony."

This assignment presents in a double aspect the proposition announced in the first assignment of error. In one sense, it imputes error to the circuit court in overruling the demurrer, and holding that the allegations set forth in the bill made a proper case for equitable relief. In the other sense, it imputes error to that court in holding that the case made by the bill had been sustained by the evidence. The first aspect of the contention has been already sufficiently considered. But it is insisted for the appellant that the alleged representations were of matters of expectation or opinion only, and not of matters of fact; and Kerr on Fraud and Mistake, 82, is cited as authority for the position that such representations "go for nothing, though they may not be true, as a man is not justified in placing reliance on them." But on pages 80, 81, the same author says: "No man can complain that another has relied too implicitly on the truth of what he himself states." And so, too, this court held in *Hull v. Fields and Thomas*, 76 Va. 594.

In *Grimm v. Byrd*, *supra*, Staples, J., said: "But even a matter of opinion may amount to an affirmation, and be an inducement to a contract, especially where the parties are not dealing upon equal terms, and one of them has, or is presumed to have, means of information not equally open to the other."

However, it is only necessary to recall the representations already set forth in order to refute the contention that they are merely of "such matters of expectation and opinion as go for nothing, though untrue." Briefly restated, the case in hand is this: The lessees, Lewis and Preston, go to the lessors, Trout and wife, representing that they are about entering upon extensive operations in mining and marketing ores; that they have the means at hand for successfully working a force capable of mining and transporting such a quantity of ore daily that the royalty thereon would, at ten cents per ton, yield the owners of the property not less than ten dollars per day, collectible every night, if desired, and promising to commence operations in sixty days. Upon these representations they

secure a lease for twenty years, but utterly fail to comply with their promises, and when sued for a rescission of the contract thus procured, they come saying for defense, "These representations were mere matters of opinion, and not representations made to induce the contract, or upon which the lessors had a right to rely." To countenance such a defense would be in effect to absolve men from that which is the chief bond of society,—open, honest dealing between man and man.

That the averments of the bill that said lessees made these representations are true, satisfactorily appears from the evidence in the cause; and that they were relied on and chiefly induced the lessors to make the lease, which has proved so disastrous to them, cannot be doubted by any impartial mind. These representations were made immediately previous to the execution of the lease, and the fact that they were not embodied in the writing makes them none the less reprehensible, or less likely to deceive and cheat. And certain it is, they were the inducements by which the lease was obtained. Nor are they in conflict with anything in the written instrument of lease. The lease was for a term of twenty years; yet, looking to its nature and object, it cannot be contended that the lessees had the option to work or not to work the ore mines for an indefinite time, and thus convert what was designed to yield a handsome daily income to the lessors into a mere barren encumbrance on his land, a cloud on his title, an incubus and a manacle which would oppress him and destroy the marketable value of his land. No lease of land for a rent, for a return to the landlord out of the land which passes, can be construed to be intended to enable the tenant merely to hold the lease for purposes of speculation, without doing and performing in connection therewith what the lease contemplated. Such a construction would indeed make all such contracts a snare for the entrapment and injury of the unwary land-owner. A man buying and paying for land may do with it as he likes,—work it, or let it lie idle. But a tenant to whom land passes for a specified purpose has no such discretion; he must perform what he stipulated to do; and if he has obtained the lease by misrepresentation and fraud, the lessor may have it rescinded in equity. For these reasons, this assignment is untenable.

3. The third assignment is, "that the circuit court erred in not holding that the complainants were estopped from setting up their claim against the appellant by J. M. Trout's promise

of September 2, 1882, to dismiss this suit." Of this transaction the version of both parties has been given in the statement of the case. The admission or the exclusion of the testimony as to it of Chapman and F. Rorer, and also of J. M. Trout, cannot alter the character of that transaction, whichever version may be adopted. Beyond all doubt, it was only inchoate and executory, and not consummated and executed. This suit was not dismissed, but was merely continued to the then next term. And the order for the fifty dollars was not presented or paid, but was returned unpaid. This transaction, then, was not an accord and satisfaction of this suit. "Accord is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions upon the same account": 3 Bla. Com. 315. This is a suit to annul a specialty, and the cause of action could not be discharged by an agreement of less dignity: *Mitchell v. Howley*, 4 Denio, 414. "Accord executory is no bar to the prosecution of an action. Accord with tender of satisfaction is insufficient": Id.; and *Brooklyn Bank v. De Grauw*, 23 Wend. 342. "Accord to be good must be executed": *Russell v. Lytle*, 6 Id. 390; 22 Am. Dec. 537; *McKean v. Reed*, Litt. Sel. Cas. 395; 12 Am. Rep. 318.

However, the appellant does not contend that this transaction was a settlement of this suit by accord and satisfaction, but only that it estopped the complainants from persisting in its prosecution. If an estoppel, it is an estoppel *in pais*, "which is one that arises from the acts, conduct, or declarations of a person by which he designedly induces another to alter his position injuriously to himself": 1 Bouv. Law Dict. 541. It is founded in fraud: *Bispham's Eq.*, sec. 282; *Bigelow on Estoppel*, sec. 437.

But this promise to stop the proceedings in this suit was never executed. In *Gerrish v. Proprietors*, 26 Me. 384, 46 Am. Dec. 568, the supreme court of that state said: "That was but an executory agreement never executed. Such an agreement does not estop a party to it from acting in such a manner as to violate its stipulations"; citing *Gibson v. Gibson*, 15 Mass. 106; 8 Am. Dec. 94; and then continued: "That was not a sealed agreement, and one cannot be barred by an estoppel of his right to an estate but by deed of record"; citing *Whitney v. Holmes*, 15 Mass. 152.

In its answer to the bill, the appellant company stated its version of said transaction, to which it is not pretended that

Coit or itself was a party, or was present at its occurrence, and adds that a short time thereafter Coit, being informed that this suit had been compromised and settled, purchased the interest of McClanahan and others in this lease, and that subsequently the Rorer Iron Company, relying upon the same assurances of compromise, purchased the said interest. Now, this statement may be viewed in various lights. If Coit and the Rorer Iron Company had been informed of this transaction, they would have known, or might have learned, that the transaction was merely inchoate,—that the suit had not been dismissed or the order paid; and so they were guilty of laches, and must, as the amendment to the bill says, “take the lease subject to the infirmities of the title of the lessees, Lewis and Preston.”

The corporation's answer does not tell us who it was that informed Coit that this suit had “been compromised and settled,” or on whose “same assurances of compromise” the company relied. It is not intimated that the complainants, or either of them, gave that information or made those assurances. Had the company averred and proved that the complainants so informed Coit, or so assured the company, the case might have been different. But there is no such averment and no such proof. Coit was not examined as a witness, and no witness hints anything of the kind, nor even that Coit ever saw J. M. Trout or the note to his counsel. The fair inference is, that Preston and his co-tenants furnished the information and made the assurances. Preston was a party, and knew this suit had not been dismissed. J. M. Trout and wife cannot be held responsible for information given Coit, or for assurances made to the Rorer Iron Company by Preston and his co-tenants. A declaration made to one man can seldom be made to influence another, who is absent when it is made, so as to bind the declarant as by estoppel,—because it would be merely secondary, and would only serve to put the absent man on inquiry, and to make it his duty to seek information from the primary source. In this instance, inquiry would necessarily have disclosed the utter untruthfulness of the information.

Preston's co-grantors, Chapman and F. Rorer, knew the transaction was merely executory. All that were interested, including Coit, had heard of the suit, and were put upon inquiry. Full information as to whether the suit was dismissed, or merely continued, was easy of access. There were Trout

and his counsel, Ballard, and the public records. Inquiry is the purchaser's duty, and he is affected with all knowledge he would have obtained had he opened his eyes and ears and done his duty: *Wood v. Krebs*, 30 Gratt. 715. If Rorer was the company's president when it made the purchase and received the conveyance, he was the more bound to ascertain the true *status* of the suit, the pendency and object of which he so well knew. The record does not show that J. M. Trout ever saw or heard of Coit, or communicated with him in any way, or did or said aught in his presence, or elsewhere, with design to induce him to do any act. Coit makes no such charge; nor does he testify to or allege any fact from which such a charge could be inferred. Nor has he complained of the decree here in question. He was not a complete purchaser, never having paid the entire purchase-money, and could not and did not make the defense of "purchaser for value without notice." In fact, he made no real defense of any kind. Nor is it averred or proved that the appellees, Trout and wife, had any communication with the appellant company at any time.

On behalf of the appellant, it is insisted that its claim to favorable consideration is much enhanced on account of the magnitude of its outlays. But the record shows that the appellant bought the Trout lease, with much other mineral property, in January, 1883, after the institution of this suit, which was brought in August, 1882, to annul that lease which the lessees had fastened upon the land of the lessors, the appellees here, only for their own speculative purposes; and that the appellant became the purchaser of said lease, with full notice of the pendency of the suit, and of its object; and that in fact all that the appellant did was done after such notice.

This Trout lease was only a very small part of the appellant's purchase. The ownership of this lease could by no means have been the inducement to build its short line of railroad, because the railroad was begun before the purchase of the lease. At all events, no part of the railroad has ever been built on the Trout land, and no expense has been incurred either by the original lessees or their alienees in mining ore upon it. In fact, the fair conclusion from all the evidence is, that the numerous other leases and mineral properties embraced in the appellant's purchase of 18th of January, 1883, were the real inducements to the outlays made, and that the Trout lease was included in the purchase and convey-

ance, at a venture for what it might be worth. We are therefore of opinion that the circuit court did not err in not holding that the complainants were estopped from prosecuting this suit.

In the view taken of this case, there is no occasion for passing on the alleged error of the court below in excluding the testimony of certain witnesses, as the admission of the testimony could not have affected the result. In fact the case has been considered in the light of all the evidence offered by the defendants in the court below. There being, then, no error in the record of which the appellant can complain, ordinarily the case would here close with a simple affirmance of the decree appealed from; but the appellees, Trout and wife, insist that the said decree is erroneous as to them, and ask that this court will, under the ninth rule, consider the whole record, and so amend the decree as to make it as it should have been entered by the said circuit court.

The appellees, however, claim that the court below erred in excepting from the operation of its decree canceling the lease executed by them to Lewis and Preston, April 29, 1881, one undivided half thereof, thus allowing the Rorer Iron Company the full benefit of the defense of "purchaser for value without notice," though that company had not set up that defense, either by its petition, or by answer or plea, as required by the settled rule of practice.

It cannot at this day be questioned that a purchaser for value without notice, actual or constructive, having obtained a conveyance, will not be affected by a latent equity, whether by lien or encumbrance, or trust or fraud, or any other claim; and that a grantee from such a purchaser stands in the same position as his grantor, though affected with notice at the time of the grant. Such purchaser must, however, be a complete purchaser; that is, he must have purchased for a valuable consideration, actually paid the entire purchase-money, and received, or be entitled to receive, a conveyance before such notice. The burden rests on him who sets up this defense to prove these three things, and the proof of payment must be actual, the mere recital of payment in the deed being insufficient. And the burden of affecting such a purchaser with notice of the equity rests on the plaintiff: 2 Minor's Institutes, 877, 878; 2 Lead. Cas. Eq. 22, 33, 62, 100; 1 Story's Eq. Jur., sec. 410; *Carter v. Carter*, 21 Gratt. 241; *Lamar v. Hale*, 79 Va. 147. But it is equally clear that in order to enable a

defendant to avail himself of the benefit of this defense of "purchaser for value without notice," he must have set up the same by his plea or by his answer; because a court of equity can only decree on the case made by the pleadings, though the evidence may show a right to further relief: *Mundy v. Vawter*, 3 Gratt. 495; *Kent v. Kent*, 82 Va. 205; Kerr on Fraud and Mistake, 370, 371, note, where that author says: "A defendant who puts in an answer, but does not set up the defense of purchaser for value without notice, cannot afterwards set up that defense." Therefore, in order to enable a court of equity to give a defendant the advantage of such defense, it is essential that he put it in issue by his pleadings; otherwise the court cannot consider and allow it, although the evidence may show that he could have maintained that defense had he set it up by his plea or by his answer.

In *Downman v. Rust*, 6 Rand. 660, Carr, J., said: "A purchaser who claims to be a purchaser for value without notice must expressly deny notice in his answer, though it is not charged in the bill. This is settled law." And in *Tomkins v. Mitchell*, 2 Rand. 430, this court laid down the same rule in nearly the same language.

In the English notes to *Basset v. Nosworthy*, 2 Lead. Cas. Eq. 25, it is said by the annotators: "Notice must be denied, whether charged in the bill or not"; citing *Aston v. Curgon*, *Weston v. Berkeley*, and *Brace v. Duchess of Marlborough*, 3 P. Wms. 244, 491. And in the American notes to the same case, at page 100, the annotators say: "Notice must be denied explicitly, whether it is or is not averred in the bill, in order to put the fact in issue, and to enable the opposite party to establish the existence of notice by proof"; citing *Harris v. Fly*, 7 Paige, 422, 424; *Moore v. Clay*, 7 Ala. 742, 751; *Downing v. Smith*, 3 Johns. Ch. 345, etc.

In *Johnson v. Toulmin*, 18 Ala. 50, it was held that "where defense of purchaser for value without notice is relied on, notice must be denied fully and particularly, though it be not charged in the bill."

In *Doussell v. King*, 7 Leigh, 393, this court, per Carr, J., said that "the defense of purchaser for value without notice may be made by answer as well as by plea." And in the same case, Tucker, P., at page 401, said: "In the present case the defendants allege that King's purchase and acquisition of title were without notice of the plaintiff's claim. The allegation is, indeed, set forth in the answer, and not by way of plea; but

the industry of my brother, Carr, has presented a train of authorities which show that the defense may well be insisted on by way of answer." This decision plainly implies that this defense must be set up either by plea or by answer, and that if set up by neither, it cannot be made by mere proof: 2 Lead. Cas. Eq. 102; 1 Barbour's Chancery Practice, 375.

To further multiply authorities to sustain a rule of chancery practice so thoroughly well established as that which requires a defendant to deny notice of the plaintiff's claim by plea or answer, even if notice be not charged in the bill, might justly be considered as superfluous. But, in argument, counsel for the appellant deny the existence of the rule, or at least its application to the case in hand; and the postulate of Carr, J., in *Downman v. Rust*, *supra*, was characterized as "a mere dictum, not deciding the point"; and *Carter v. Allen*, *supra*, is cited as authority for their contention. This is a clear misapprehension of counsel. That case was wholly unlike the case here. It was a bill to impeach a decree confirming a judicial sale of a lunatic's land, on the ground that the sale to the nominal purchaser was "a sham," and the committee of the lunatic was the real purchaser, who, by express statute, was forbidden to become such purchaser. And in discussing the pleadings in that case, Christian, J., in delivering the unanimous opinion of the court, said: "But she does not pretend to allege, in any form, in a bill of unusual length, that either Garrett or Barksdale had any notice of the fact upon which she relies to impeach the decree, to wit, that Carter, and not Chapman, was the real purchaser; and that under the statute the sale was therefore void. No notice to them, actual or constructive, is charged in the bill. Nor is there anything in the proceedings or decree which she seeks to impeach which could possibly bring home to them knowledge of the alleged legal fraud." Thus, so far from there being in the case of *Carter v. Allen*, *supra*, anything to the contrary, that case expressly refers to the rule under consideration, and fully recognizes and sustains it.

No further comment on *Carter v. Allen*, *supra*, can be necessary. The rule in question is in reality elementary. It grows logically out of the fact that the defense of "purchaser for value without notice," however presented, whether by plea or by answer, is manifestly a confession and avoidance of the plaintiff's claim,—the avoiding part being strictly affirmative matter.

In *Boone v. Chiles*, 10 Pet. 211, the supreme court of the United States, treating of this defense, said: "It is setting up new matter not in the bill; a new case is presented, not responsive to the bill, but one founded on a right and title operating, if made out, to bar and avoid the plaintiff's equity, which must otherwise prevail. The answer setting it up is no evidence against the plaintiff, who is not bound to contradict or rebut it."

In the case at bar, the complainants file their bill against their lessees, alleging that they procured the deed of lease through fraud. The appellant, the Rorer Iron Company, filed its petition reciting the lease and the intermediate alienations whereby it became its sole owner, insisting that by J. M. Trout's promise to dismiss the suit the complainants were estopped to prosecute the same, and praying that itself and the intermediate alienees be made parties. The bill was amended, making these alienees parties, and charging them with acquiring the lease subject to all the infirmities of the title of the original lessees. The company answered, again reciting the lease, giving the lessees' version of its execution, insisting on the alleged estoppel, and stating that Coit had been informed that the suit had been settled, and that he had purchased the lease, and that itself, the appellant company, relying on the same assurances, had purchased it from him and made its outlays. But nowhere does the company's answer set up the defense of "purchaser for value without notice," whether by reason of itself being such purchaser, or by reason of its being the grantee of such purchaser. And yet it is insisted for the appellant, and was held by the circuit court, that the said company could avail itself of such defense, although it had not set it up.

In fact, the record discloses that the very idea of such defense never occurred to said company. And very naturally the idea did not occur to it, not only because, as appears as well from its own admissions as from the evidence, it did itself have notice of the complainants' claim, but also because of the fact—seemingly well known to the company through its president—that all the intermediate alienees had such notice, or at least had ample opportunity of acquiring it, from the very peculiar nature of this transaction and its attendant circumstances.

First, it was a mere lease for years—not a conveyance in fee—of land, the consideration whereof was a rent payable

out of the land in the shape of a bonus on every ton of ore mined thereon; secondly, the admitted, visible, and notorious circumstance that from the date of the lease up to the day before the deposition of the stockholder and alienee, McClanahan, in November, 1883,—long after the dates of all the conveyances,—no ore had been mined on Trout's land under this lease; and thirdly, the additional well-known circumstance that the lessees, Lewis and Preston, were not in possession of the leased premises when they conveyed the same to these alienees. These things surely were enough to put any prudent intended purchaser on inquiry, which inquiry it was their duty to make before purchasing the lease, and which inquiry, had it been made, could not have failed to discover to them all about the plaintiffs' claim.

It is well-settled law that whatever puts a purchaser on inquiry is equivalent to notice. Possession of the property by a person other than the vendor is universally regarded as sufficient to put a purchaser on inquiry, and to affect him with knowledge of the claims of the possessor: *Baynard v. Norris*, 5 Gill, 468; 46 Am. Dec. 647; *Pendleton v. Fay*, 2 Paige, 202; *Graff v. Castleman*, 5 Rand. 207; 16 Am. Dec. 741; *Baxter v. Sewell*, 3 Md. 341; *Wood v. Krebbs*, 30 Gratt. 708. "Possession of land is notice of the possessor's claim to it, because the tenant must abide by his answers to the interrogations of one about to buy": 2 Lead. Cas. Eq. 50, 100, 180, and Mr. Justice Baldwin in *Boone v. Chiles*, *supra*.

There can be, then, no reason for hesitating as to the propriety of holding that the inferences necessarily deducible from these pregnant circumstances are more than sufficient to affect with notice the four grantors, McClanahan, Chapman, Rorer, and Green, the fifth grantor being Preston. The answer, containing only affirmative matter not responsive to any allegation in the bill, can furnish no evidence to support the testimony of the single witness, Chapman, who, speaking for himself alone, denied that he had such notice.

The others, except Green, who did not make oath to or sign the answer, were all examined as witnesses for the appellant, but were not questioned on the point of notice. Rorer, it is admitted, was not a complete purchaser. Preston, the original lessee, of course had notice. All five were tenants in common. The conclusion is irresistible that all of them were alike aware of the complaints of Trout against his lessees, Lewis and Preston.

And now recurring to the answer of McClanahan, Rorer, Chapman, and Green, whereby they did attempt to present, but in their own behalf only (for they made no allusion whatever either to Coit or to the Rorer Iron Company), the defense of purchaser for value without notice, it has been seen that that answer was insufficient for that purpose, even if it had been clearly established by proof, inasmuch as it omitted to make the essential averment that at the time of the execution of the conveyances to these respondents their grantors were in possession of the premises conveyed. In *Baynard v. Norris*, *supra*, the supreme court of Maryland said: "It cannot, at this late day, be doubted that a defendant, being a *bona fide* purchaser for value without notice, can defend himself against a complainant asserting a prior equitable claim, by way of answer as well as by the usual plea in bar founded upon such a purchase. But to render such a defense available at the trial, the answer must contain an averment of every material fact requisite to sustain such a plea if demurred to. Does the answer of Morris and Jones contain all such material averments? is therefore the obvious inquiry to be made in this case. It does sufficiently state some of the facts indispensable to such a plea, to wit, the transfer of the legal title, the *bona fides* of the transaction, a valuable consideration paid, and its payment before they had notice of the plaintiff's claim. But the answer has omitted to state one essential fact, to wit, that the grantor was at the time of the conveyance possessed of the premises conveyed"; and cited *Equity Draftsman*, 449; 3 *Sugden on Vendors*, 345, 346; *Daniels v. Davidson*, 16 Ves. 247.

In *Boone v. Chiles*, *supra*, the supreme court of the United States, speaking of this defense, said: "In setting it up by plea or answer, it must state the deed of purchase, that the vendor was in possession," etc. All the authorities seem to concur in holding that if the purchaser does not file his plea, but submits to answer, he must answer fully setting up the essentials of the plea: 2 *Lead. Cas. Eq.* 26, 27; 1 *Barbour's Chancery Practice*, 375, 386, note 3; 4 *Minor's Institutes*, old ed., 1177. And they fully sustain the position taken here, that the answer of these intermediate grantors of the Rorer Iron Company does not sufficiently set up the plea of purchaser for value without notice, even in their own behalf, and of course it could avail naught in behalf of said company, to which it makes no allusion, and which did not even attempt

to set up such defense for itself, or to refer to the answer of its co-defendants.

The defense, then, of purchaser for value without notice was not put in issue by the pleadings in this cause. And even if the evidence had clearly proved—which it did not do—that the defendants, or any of them, could have maintained such defense as to the whole, or as to any part of the Trout lease, yet the court below could not award relief on such ground, inasmuch as it was bound to confine its decree to the case made by the pleadings. “A party is not allowed to state one case in a bill or answer, and make out a different one by proof,” says Mr. Justice Baldwin, in *Boone v. Chiles*, *supra*.

For these reasons we are clearly of opinion that though the circuit court did not in its decree complained of commit any error of which the appellant can complain, yet it did err in excepting from cancellation the one undivided half of the lease which the appellees, Trout and wife, executed on the 29th of April, 1881, to Lewis and Preston, and which passed from them to McClanahan and others through Coit to the appellant, and in decreeing that McClanahan, Chapman, and Green recover of the complainants their costs by them in that court about their defense in that behalf expended; and that for this error the said decree must be reversed in favor of the said appellees, Trout and wife, and be amended and corrected so that it will operate to cancel the said entire lease, with costs to the appellees, and that the same, so amended and corrected, be affirmed.

Decree amended and affirmed.

FALSE REPRESENTATIONS WHICH OPERATE AS AN INDUCEMENT to enter into the contract will operate to avoid it: *Henderson v. San Antonio etc. R. R. Co.*, 67 Am. Dec. 675; *Rimer v. Dugan*, 77 Id. 687, and notes.

ESTOPPEL IN PAIS IS DEFINED in *Weinstein v. National Bank*, 5 Am. St. Rep. 23, and note 28.

ERRONEOUS REJECTION OF EVIDENCE WHICH COULD NOT AFFECT RESULT is not ground for reversal of judgment: *Kisting v. Shaw*, 91 Am. Dec. 645, and note.

DEFENSE OF BONA FIDE PURCHASER MUST BE PLEADED, and must be set forth with certainty and particularity: *Cummings v. Coleman*, 62 Am. Dec. 402; *Evarts v. Agnes*, 65 Id. 314; *Weber v. Rothschild*, 15 Or. 385.

POSSESSION BY PERSON OTHER THAN VENDOR IS SUFFICIENT to put purchaser on inquiry: See *Knapp v. Bailey*, 1 Am. St. Rep. 295, and note.

VAUGHT v. RIDER.

[88 VIRGINIA, 669.]

LOAN OF MONEY TO DEBTOR TO PAY USURIOUS DEBT WITH is not affected with the illegality in the usurious loan, where the security for that loan is satisfied and extinguished, and that for the new loan is given upon a new consideration, and is a wholly different and distinct obligation, even though the lender knows that the original loan was usurious and is aware of the borrower's object in obtaining the new loan.

TO DENY CONTINUANCE, ON MOTION TO DISSOLVE INJUNCTION RESTRAINING SALE, IS ERROR, where the motion for such continuance is made by the complainant to enable him to complete his proofs, and is supported by an affidavit to the effect that he has additional and material evidence to take in the case, which will show that the notice of sale is defective, and which, up to this time, he has been unable to take, although he has used due diligence in perfecting his proofs.

BILL to enjoin a sale. The opinion states the case.

F. S. Blair, for the appellant.

Crocket, Holbrook, and Thomas, for the appellees.

LEWIS, President. That every security for a usurious debt, however often renewed, is affected by the original illegal consideration, is a proposition well established and undisputed: *Drake's Ex'r v. Chandler*, 18 Gratt. 909; 98 Am. Dec. 762; *Walker v. Bank of Washington*, 3 How. 62. In the present case, however, as presented by the record, we agree with the circuit judge that whatever may have been the nature of the transactions between the appellant and Lambert, which are charged to have been usurious, the vice of usury does not enter into the transactions between the appellant and Fisher. Indeed, the bill—to which there was a demurrer—does not charge, in terms, that the Fisher debt is tainted with usury, but charges that Fisher assumed the payment of the Lambert debt with knowledge of its usurious nature. It also charges that Fisher “offered to purchase” the Lambert debt, but it does not charge that, in point of fact, he did purchase it, or that he acquired any interest in it. True, it is charged that the Lambert and the Fisher debts are the same,—that the latter is merely a substitution or renewal of the former. But this is a conclusion not warranted by any facts set forth in the bill. Hence, there was no error in not directing an issue under the statute to try whether or no the Fisher debt is usurious, since there is nothing in the bill upon which such an issue could have been properly directed: Code 1873, c. 137, sec. 12.

This is conclusive of the case upon the question of usury. And if we look into the evidence, the deposition of the appellant himself negatives the position taken in the petition for appeal, and shows the following facts: That on the 17th of July, 1883, he was indebted to Lambert in a sum amounting to about \$1,500, evidenced by bond, the payment of which was secured by a deed of trust on a tract of land in Wythe County; that Lambert being about to enforce the deed of trust, he (the appellant) applied to Fisher, who was a stranger to the original transaction, for a loan, and thereupon took from him an assignment of certain notes and bonds held by Fisher on Lambert, which aggregated the sum of \$1,496, and at the same time received from Fisher four dollars in money, making in all the exact sum of \$1,500; that for this sum he, on the same day, executed his bond to Fisher, payable two years after its date, and bearing six per cent interest, and secured the same by a deed of trust on the tract of land above mentioned. And in answer to a direct question he says, emphatically: "I do not claim that there was usury between me and Mr. Fisher. I only claim there was usury between me and Lambert." He also testifies that the notes and bonds he got from Fisher "went to satisfy the Lambert debt," and that he paid it. He does not say that there was any purchase or assignment of the debt, or that Lambert was a party to the transactions between himself and Fisher, or that the latter acquired any interest whatever in the debt; and the presumption is, though he does not say so, that the bond evidencing the debt was surrendered and canceled,—all of which shows that the debt was satisfied and extinguished, and that the Fisher bond was given upon a new consideration, and is a wholly different and distinct obligation. Nor does the fact that Fisher had notice that the debt was usurious, and that he was aware of the appellant's object in taking the assignment of the notes and bonds above mentioned, alter the case in the slightest degree. This is too plain to require discussion: *Coffman and Bruffy v. Miller & Co.*, 26 Gratt. 698; *Drake's Ex'r v. Chandler*, 18 Id. 909; 98 Am. Dec. 762.

We are of opinion, however, that there was error in overruling the motion of the complainant to continue the case to enable him to complete his proofs. Upon this point the record shows that on the twenty-eighth of January, 1887, the further taking of testimony was continued by consent of parties until the thirty-first of the same month, and that on

the twenty-ninth of the same month the motion to dissolve the injunction, theretofore awarded to restrain the advertised sale of the land under the Fisher deed of trust, was heard, pursuant to notice, by the circuit judge in vacation; that the complainant appeared and moved to continue the motion until the hearing at the following (March) term, calling attention to the agreement to continue the taking of testimony to a future day, and further supporting his motion by affidavit to the effect that he had additional and material evidence to take in the cause, which up to that time he had been unable to take, although he had used due diligence in perfecting his proofs. The motion to continue, however, was overruled, and the injunction was dissolved, because, as recited in the order, "it appears from the bill, as well as the testimony of the complainant, that the transactions between the complainant and Fisher were not usurious, whatever may have been the nature of the transactions between the complainant and Lambert."

This would be good ground for dissolving the injunction if the bill had prayed for relief on the ground of usury alone. But such is not the case. A copy of the Fisher deed of trust is exhibited with the bill, from which it appears that it was stipulated in the deed that a sale under it shall not be made until after thirty days' notice of the time, place, and terms of sale shall have been given by posting notices at the front door of Wythe court-house, "and in such other manner as the said Vaught [the complainant] may desire." And the bill alleges, as one of the grounds upon which an injunction is prayed for, that only one notice of the proposed sale had been posted, and that at the front door of the court-house, eighteen miles distant from the land, and that "the complainant had no knowledge of the proposed advertisement, and was not consulted in regard to the same."

This allegation is not denied in the answers, and if it shall be established by proof, the facts alleged will entitle the complainant to an injunction to prevent the sale until proper notice shall have been given. For, under the terms of the deed, the complainant has the right to give reasonable directions as to the manner of advertising notice of sale, and hence there can be no proper advertisement until he has had the opportunity of exercising the privilege in respect thereto stipulated for in the deed. The motion to continue ought, therefore, to have been granted, and for this error the decree must

be reversed, the injunction reinstated, and the cause remanded for further proceedings, in conformity with this opinion.

Decree reversed.

WHAT CONTRACTS ARE USURIOUS is the subject of the notes to *Davis v. Garr*, 55 Am. Dec. 391-400, and to *Sylvester v. Swan*, 81 Id. 736-738.

RIGHT TO CONTINUANCES IN CIVIL CAUSES is fully discussed in the note to *Stevenson v. Sherwood*, 74 Am. Dec. 141-151.

NAGLEE v. ALEXANDRIA AND FREDERICKSBURG RAILWAY COMPANY.

[83 VIRGINIA, 707.]

RAILROAD COMPANY CANNOT EVADE ITS LEGAL LIABILITY FOR INJURIES CAUSED BY NEGLIGENT OPERATION of its road by voluntarily conveying and surrendering indefinitely to mortgage trustees of its own selection its road and franchises, where there is no statutory provision authorizing or regulating the transfer and surrender.

TRESPASS on the case. The opinion states the facts.

S. F. Beach and John M. Johnson, for the plaintiff in error.

Francis L. Smith, for the defendant in error.

FAUNTLEROY, J. This action is trespass on the case, to recover damages from the defendant for the destruction of the plaintiff's property by fire alleged to have been caused by the negligence of the defendant company's agents and servants. There was a demurrer to the evidence, and damages to the amount of eighteen hundred dollars were assessed by the jury for the plaintiff, subject to the judgment of the court on the demurrer to the evidence. Judgment on the demurrer was given for the defendant, the court holding that as the defendant's railroad, at the time of the burning, was operated by trustees under a deed of trust, the company itself was not responsible. This ruling of the court is assigned as error, and this is the only question in the case.

It is proved by the evidence in the record, and admitted by the demurrer to the evidence, that the plaintiff's property (his fencing, timber, and grass) was extensively and repeatedly, as alleged in the declaration, destroyed by fires caused by the negligent operation of the locomotives running over the railroad of the defendant company; but the defense is set up by the company, and sustained by the court, that at the time of the injury inflicted, in 1880 and 1881, the railroad property

of the defendant company was in the possession of and being operated by the trustees in a deed of trust executed by the defendant in June, 1866, the said trustees having taken possession of the road, and controlled and operated it since December, 1872. No evidence was offered to prove, nor was it pretended, that the surrender of the possession and control and operation of the road by the company to the said trustees was in any way or form involuntary or compulsory; nor was there any effort or evidence to prove that the public at any time had notice, either actual or constructive, of such transfer or surrender. The proof simply was, that the trustees, during the period named, had the possession and operation of the road. The defendant, the Alexandria and Fredericksburg Railway Company, was chartered by the general assembly of Virginia, February 3, 1864, and its charter was amended by an act approved June 4, 1870. By its charter and by the presumption of law it is bound to all its obligations and duties to the public, and it is the party *prima facie* responsible for injuries to persons or property caused by its negligence in the operation of its road; and being, *a priori*, so bound and liable, it remained so until by its own burden of evidence every basis for the presumption had been completely removed. The defendant company, claiming exemption from its presumptive legal liability for the proved and admitted injury caused by the operation of its road, under the plea of a previous surrender of the possession, control, and operation of its road to its own selected agents, it is bound to show its legal authority for the deed of trust or contract by which it could shift its legal liability and transfer to its own trustees the performance of duties which it assumed by the acceptance of its charter,—the performance of which duties was the consideration for the grant of its charter; and having shown so much, if it were possible in the case, it remains for it further to show that the surrender or transfer in time, manner, and circumstance was such as to exonerate it from subsequent responsibility to the public for the manner and consequences of the discharge of its charter duties and obligations.

The decisions are numerous in which railroad companies have been held exempt from liability for injuries, torts, or breaches of contract growing out of the operation of their road in the hands of mortgage trustees; but the cases were those in which the power to mortgage was conferred by charter, and where the possession of the trustees was adverse to

the company and the result of proceedings *in invitum*,—cases arising in those states where special statutes existed authorizing and regulating the surrender and transfer of a company's road and franchises to trustees for the benefit of creditors. In an elaborate note by the editor of the American Decisions (*Coe v. Columbus R. R. Co.*, 75 Am. Dec. 548), on "railroad corporation's power to transfer its franchises and property," where the authorities on the subject are collected and compared, the cases of *Hall v. Railroad*, 21 Law Rep. 138 (quoted and relied on in brief of counsel for defendant in error), and of *Railroad v. Metcalfe*, 4 Met. (Ky.) 200 (also cited for defendant in error), are specially noticed as conflicting with other decisions upon the subject, and preference is given to the other decisions as expressing the correct view of the law. In the case of *Coe v. Railroad Co.*, 10 Ohio St. 375, 75 Am. Dec. 518 (also quoted by the defendant in error), the court held that the company could mortgage its franchise to take toll and to maintain the railway, because of distinct legislative authority so to mortgage the franchise.

The question in this case under review is, whether in this state, where there is no statutory provision authorizing or regulating the transfer and surrender of its road, the company defendant can escape liability for a proved injury by showing a previous voluntary surrender to mortgage trustees, and indefinitely substitute those trustees for the company in the exercise of their corporate rights and franchises, and the discharge of their charter obligations to the public, so as to exonerate the company from liability for injuries inflicted in the operation of the road upon the persons or property of the public. To affirm this question would be to place the public at the mercy of collusive arrangements by which the ends of justice would all be defeated, and would conflict with every principle and analogy of the law of Virginia.

A railroad company in Virginia is a *quasi* public corporation, which, whatever it may do, cannot, by its own voluntary contract or collusion, surrender its functions and responsibilities to agents or trustees of its own selection, living, it may be (and as in this case is the fact, by the record), outside the limits of the state, beyond the reach of its tribunals and its process, with no one in the state to respond to the demands for the wrongs and injuries done to its citizens, howsoever grievous or heinous they might be: See 1 Wood on Railway Law, sec. 5, pp. 9, 10; 2 Id., sec. 345, p. 1392; *Thomas v. Rail-*

road Co., 101 U. S. 71; 1 Rorer on Railroads, 238; Pierce on Railroads, 496, and note. The franchises and powers of such a company are in large measure designed to be executed for the public good, and this exercise of them is the consideration for granting them. A contract by which the company renders itself incapable of performing its duties to the public, or attempts to absolve itself from its obligations, without the consent of the state, violates its charter, and is forbidden by public policy: *Thomas v. Railroad Co.*, *supra*. "Such corporations are created . . . to answer the public good, . . . and cannot, therefore, by mere common-law authority, divest themselves by direct act of their capacity to discharge the duties to the public which devolve upon them; and as a sequence thereto, cannot do that which may indirectly lead to the same thing; as, for instance, make a mortgage, which, by foreclosure and sale, may end in bringing about the inhibited result": 1 Rorer on Railroads, 238.

In Pierce on Railroads, 496, it is said: "The company cannot, according to the current of the decisions, without special authority of statute, alienate its franchise or property acquired under the right of eminent domain or essential to the performance of its duty to the public, whether by sale, mortgage, or lease."

In *Railroad Co. v. Brown*, 17 Wall. 450, the supreme court says: "It is the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the state, by a voluntary surrender of its road into the hands of lessees." A voluntary surrender to trustees, under a mortgage for which there is no legislative authority, cannot have a different operation.

In *Railroad Co. v. Winans*, 17 How. 39, it is said: "The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature."

The supreme court of Massachusetts, in *Richardson v. Sibley*, 11 Allen, 65, say: "A corporation, created for the very purpose of constructing, owning, and managing a railroad for the accommodation and benefit of the public, cannot, without distinct legislative authority, make any alienation, absolute or conditional, either of the general franchise to be a corporation, or of the subordinate franchise to manage and carry on its corporate business, 'which,' says the learned editor of the American Decisions in one of its recent volumes (75 Am. Dec. 549), 'in our opinion, expresses the correct view.'"

The supreme court of New Hampshire, in *Pierce v. Emery*, 32 N. H. 484, say: "They may sell or mortgage their personal property, but they cannot sell or mortgage with it the right to manage and control the road, nor any corporate right or franchise."

The supreme court of the United States, in one of its very latest decisions (*Pennsylvania Co. v. St. Louis, Alton etc. R. R.*, 118 U. S. 309), says: "We think it may be stated as the just result of these cases, and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road, and all its appurtenances, the use of its franchise, and the exercise of its powers."

The same facts as in this case—so far as the effect of the possession of the road of the company and its operation by trustees under a mortgage was the question—were before the supreme court of Illinois in the case of *Grand Tower Manufacturing and Transportation Co. v. Ullman*, 89 Ill. 244, and it was held that where a railroad is in the hands of trustees, exercising the same functions the corporation was formed to exercise, and injury ensues, a person may sue the corporation and recover damages, and will not be compelled to sue the trustees, though both were liable and might be sued.

In the case of *Thomas v. Railroad Co.*, 101 U. S. 71, it was contended that "a corporate body may (as at common law) do any act which is not, either expressly or impliedly, prohibited by its charter," etc.; but the court said: "We do not concur in this proposition. We take the general doctrine to be, in this country (though there may be exceptional cases and some authorities to the contrary), that the powers of corporations, organized under legislative statutes, are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

No provision is found in the charter of the defendant company, or in the general railroad law of Virginia, which will authorize the company to transfer to trustees or to mortgagees, under the deed of trust given as a mere encumbrance and security, the right and legal capacity to step into the shoes of the company, and assume and exercise indefinitely the fran-

chises, rights, and privileges of the company, so as to give the company exemption and immunity from responsibility for all injuries inflicted by the operation of the road by the trustees. Whatever may be the effect of the deed of trust upon the "works and property" of the company, as a security between the company and its bond-holders, it cannot be set up by the company as a defense against liability for injuries to persons or property inflicted by the negligent operation of the road. "A mortgage by which a corporation undertakes to mortgage both its property and franchises may be good as to the property, although invalid as to the franchises": 3 Wood on Railway Law, sec. 456. But assuming the validity of the deed of trust, as well for the encumbrance of the franchises as the works and property of the company, and the lawful duty and necessity for the trustees to take possession of both, for and until a sale could be effected, and a conveyance made to the purchaser, according to the terms of the deed of trust, and the requirements of the railroad law of the state, it is against the public policy and law of Virginia that they may take possession of the road, and manage and control its operation indefinitely, or, as in this case, for eleven years, and thereby exempt the company from its legal and moral responsibilities to the public under its charter.

We are of opinion that the circuit court of Prince William County erred in holding the defendant in this case to be exempt from liability for the injury sustained by the plaintiff; that the judgment complained of must be reversed and annulled, and that this court will enter judgment for the plaintiff upon the verdict rendered by the jury upon the facts in the case.

Judgment affirmed.

LIABILITY OF RAILROAD CORPORATIONS WHILE ROAD IS IN HANDS OF TRUSTEES OR RECEIVERS. — All the authorities agree that, in the absence of any absolute liability created by statute, a railroad company whose road, with all its appurtenances, is in the exclusive possession, use, and control of a receiver who has power to employ, control, and dismiss all the agents, servants, and employees engaged in its operation, is not liable for injuries resulting from the negligence of the agents and servants of the receiver operating the road. The company, under such circumstances, has no power to control either the receiver or his employees. His possession is not that of the company, but is antagonistic thereto. And, to an action brought against a railroad company to recover damages for injuries alleged to have resulted from the negligence of servants or employees, it is a sufficient defense that at the time of the alleged injury the road was not in the possession of the company, but in the possession of a receiver, who had exclusive charge of the employment and direction of the agents and servants engaged in operating

it: High on Receivers, 2d ed., sec. 396; 2 Rorer on Railroads, 896; 3 Wood's Railway Law, sec. 478; 25 Am. Law Reg., N. S., 302; *Memphis etc. R'y Co. v. Stringfellow*, 44 Ark. 322; *Ohio etc. R. R. Co. v. Anderson*, 10 Ill. App. 313; *Ohio etc. R. R. Co. v. Davis*, 23 Ind. 553; 85 Am. Dec. 477; *Bell v. Indianapolis etc. R. R. Co.*, 53 Ind. 57; *Turner v. Hannibal etc. R. R. Co.*, 74 Mo. 602; *Rogers v. Mobile etc. R. R. Co.*, Sup. Ct. Tenn., June, 1883; 12 Am. & Eng. R. R. Cas. 442; 17 Cent. L. J. 290; 16 Rep. 536; *Hicks v. I. & G. N. R'y Co.*, 62 Tex. 38; *Davis v. Duncan*, 19 Fed. Rep. 477. And the same principle applies where the road is in the hands of mortgage trustees: *State v. Consolidated European & N. A. R'y Co.*, 67 Me. 479. Wood says: "Upon the appointment of a receiver, the functions, powers, and liabilities of the corporation are suspended, and from that time it ceases to be liable for any contracts made or acts done in the operation of the road by the receiver, unless the statute otherwise provides, or the possession of the receiver and the corporation, or its lessee, is joint": 3 Wood's Railway Law, sec. 478.

WHERE ABSOLUTE LIABILITY IS IMPOSED UPON RAILROAD COMPANY BY STATUTE, as where the company is made by statute absolutely liable for the killing of stock in cases where its road is not securely fenced, the fact that the road has passed into the hands of a receiver appointed by the federal court constitutes no defense to an action on such liability in the state court, and the plaintiff therein may recover judgment against the company notwithstanding the possession of the receiver. In such cases, the corporate body is still held to exist, and since the law renders it liable the receiver operates the road subject to such liability: High on Receivers, 2d ed., sec. 397; *Ohio etc. R. R. Co. v. Fitch*, 20 Ind. 498; *McKinney v. Ohio etc. R. R. Co.*, 22 Id. 99; *New Albany etc. R. R. Co. v. Cauble*, 46 Id. 277; *Indianapolis etc. R. R. Co. v. Ray*, 51 Id. 269; *Kansas Pacific R'y Co. v. Wood*, 24 Kan. 619. The Indiana statute expressly provided that an action in such case might be brought against the railroad, whether it was being run by the company, or by a lessee, assignee, receiver, or other person, in the name of the company. And this provision of the statute was held to be constitutional in the case of *New Albany etc. R. R. Co. v. Cauble*, 46 Ind. 277. And it was also held in that case that service of process in such a case upon the conductor of a train passing through the county in which the animal was killed was sufficient, although the conductor was employed and controlled by the receiver. A statute of Illinois authorized the owner or occupier of land adjoining a railroad, which refused to fence its road, to build a fence and bring an action against the company to recover twice the cost of building it. It was held to be no defense to such an action that the road was in the hands of a receiver. Such a statute, the court said, was a police regulation of the state, and it was not within the jurisdiction of any court, state or federal, to arrest its operation: *Ohio etc. R'y Co. v. Russell*, 115 Ill. 52.

POSSESSION OF RECEIVER MUST BE EXCLUSIVE TO RELIEVE COMPANY from liability for the negligence of agents and servants employed in operating the road. A railroad corporation whose road is run on the joint account of a receiver of part of it, and the lessee of the remaining part, is liable for injuries inflicted by a servant of the parties operating it upon the person of a passenger whom such servant improperly expelled from a car, the company having allowed tickets to be issued in its own name, the same as before the appointment of the receiver, and it not appearing that the passenger knew that the corporation was not itself managing the road: *Railroad Co. v. Brown*, 17 Wall. 445.

EFFECT ON PENDING ACTION OF APPOINTMENT OF RECEIVER.—The appointment of a receiver and an order of the court placing a railroad under his control furnish no ground for the continuance of a suit regularly brought against the corporation prior to such adjudication. Putting the property of the company into the hands of a receiver will not abate, continue, or bar such pending action: *Toledo etc. R'y Co. v. Beggs*, 85 Ill. 80.

RECEIVER IS LIABLE IN HIS OFFICIAL CAPACITY for injuries resulting from the negligent operation of the road in all cases where the company itself would be liable if it were carrying on the business in its own name: 3 Wood's Railway Law, sec. 385; 25 Am. Law Reg., N. S., 302; *Ohio etc. R. R. Co. v. Anderson*, 10 Ill. App. 313; *Sloan v. Central Iowa R'y Co.*, 62 Iowa, 728; *Paige v. Smith*, 99 Mass. 395; *Smith v. Eastern R. R. Co.*, 124 Id. 154; *Klein v. Jewett*, 26 N. J. Eq. 474; *Little v. Dusenberry*, 46 N. J. L. 614; 50 Am. Rep. 445; *Meara's Adm'r v. Holbrook*, 20 Ohio St. 137; 5 Am. Rep. 633; *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349; *Newell v. Smith*, 49 Vt. 255; *Lyman v. Central Vt. R. R. Co.*, 59 Id. 167; *Melendy v. Barbours*, 78 Va. 544; *Kennedy v. Indianapolis etc. R. R. Co.*, 2 Flip. 704; *Missouri Pac. R'y Co. v. Texas Pac. R'y Co.*, 30 Fed. Rep. 167; *Farlow v. Kelly*, 108 U. S. 288. And the same rule applies in cases of trustees operating a railroad: *Lamphear v. Buckingham*, 33 Conn. 237; *Barter v. Wheeler*, 49 N. H. 9; 6 Am. Rep. 434; *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686. In the case of *Barter v. Wheeler*, 6 Am. Rep. 456, Bellows, C. J., delivering the opinion of the court, said: "The trustees are in possession and have the legal title, they appear to the public as the proprietors, and they alone receive and control the income of the railroad, out of which indemnity for losses is to be had. Such being the case, we think they ought to be held liable; otherwise there would, in most instances, be substantially no remedy for the loss of goods." But the receiver, or trustee, is not personally liable for injuries resulting from the negligence of the agents and servants employed by him in operating the road in his hands: 3 Wood's Railway Law, sec. 385; *Cardot v. Barney*, 63 N. Y. 281; 20 Am. Rep. 533. In *Camp v. Barney*, 6 Thomp. & C. 622, 4 Hun, 373, however, it was held that where a judgment was rendered for such an injury against the receiver personally, the record might be so amended as to make the judgment one against the receiver as such. And the earnings of a railroad in the hands of a receiver are chargeable with the amount of any damages recovered against him in such suits: *Mobile etc. R. R. Co. v. Davis*, 62 Miss. 271; *Cowdery v. Galveston etc. R. R. Co.*, 93 U. S. 352. An action may be maintained against a receiver of a railroad for a tort committed by the company prior to his appointment, and if a judgment be recovered against him as receiver, it may be satisfied out of assets in his hands: *Combs v. Smith*, 78 Mo. 32; *Harding v. Nettleton*, 86 Id. 658. But in Tennessee it is held that the receiver of a delinquent railroad, appointed by the governor of the state, under a statute of that state, is a public agent, and as such is not liable for the wrongs or negligence of his employees, but only for his own wrongful acts or delinquencies: *Hopkins v. Connel*, 2 Tenn. Ch. 323; *Erwin v. Davenport*, 9 Heisk. 44. In Georgia there is a statute in force which renders a railroad company liable for negligence of the co-employees of the party injured. But it is held that an employee of a receiver of a railroad is not to be treated as an employee of a railroad company, so as to entitle him to reap the benefit of this statute, which offers nothing to any but the latter class of employees: *Henderson v. Walker*, 55 Ga. 481. The receiver or assignee of a railroad company, appointed in involuntary bankruptcy proceedings, is not the agent of

the corporation, so as to render it liable for injuries caused by his negligence while operating the road: *Metz v. Buffalo etc. R. R. Co.*, 58 N. Y. 61; 17 Am. Rep. 201.

WHETHER LEAVE TO SUE RECEIVER IS NECESSARY.—The question whether or not it is necessary to obtain leave of the court which appointed the receiver before bringing suit against him, is one upon which the authorities are divided. In the case of *Barton v. Barbour*, 3 McAr. 212, 36 Am. Rep. 104, the plaintiff brought an action in the District of Columbia to recover damages for personal injuries against the defendant, who had been appointed, in Virginia, receiver of a railroad in that state. The defendant pleaded that no leave to sue had been obtained from the court that appointed the receiver. To this plea the plaintiff demurred, and judgment was rendered for the defendant upon the demurrer. An appeal was taken to the supreme court of the United States, which affirmed the decision of the supreme court of the District of Columbia, Mr. Justice Miller dissenting: *Barton v. Barbour*, 104 U. S. 126. This decision has been approved in *Melendy v. Barbour*, 78 Va. 544, and in *Keen v. Breckenridge*, 96 Ind. 69. The doctrine that leave of the court that appointed the receiver must be obtained is also held by the following authorities: *De Graffenried v. Brunswick & A. R. R. Co.*, 57 Ga. 22; *Jordan v. Wells*, 3 Woods, 527; *Klein v. Jewett*, 26 N. J. Eq. 474; *Palys v. Jewett*, 32 Id. 302; Beach on Receivers, sec. 652. In *Palys v. Jewett*, *supra*, it was said that permission could not be refused unless the claim preferred be manifestly unfounded and vexatious. But in *Jordan v. Wells*, *supra*, it was held that a court by which a receiver has been appointed ought not to allow the receiver to be sued, unless the petition for leave states a *prima facie* cause of action against him. In *Little v. Dusenberry*, 46 N. J. L. 614, 50 Am. Rep. 445, it was said that if want of leave is not set up as a defense, it will be presumed that the plaintiff had leave. Subsequent to the decision in *Barton v. Barbour*, *supra*, Congress passed the following act: "That every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice": 24 U. S. Stats. at Large, 554, sec. 3. In the following cases it has been decided that it is not necessary to first obtain leave of the court by which the receiver was appointed: *Kinney v. Crocker*, 18 Wis. 74; *Allen v. Central R. R. Co.*, 42 Iowa, 683; *Lyman v. Central Vermont R. R. Co.*, 59 Vt. 167. And in *St. Joseph etc. R. R. Co. v. Smith*, 19 Kan. 225, it was held that an answer that the defendant is a receiver of a railroad duly appointed by another court raises no question as to the jurisdiction of the court in which such answer is filed, because the appointment of a receiver in no manner affects the ordinary jurisdiction of other tribunals. And in *Wyatt v. Ohio etc. R. R. Co.*, 10 Ill. App. 289, it was held that in an action against a railroad company, the fact that the road is in the hands of a receiver cannot be inquired into upon a motion to dismiss for want of jurisdiction, although it may be urged in defense of the action.

LIABILITY OF RAILROADS FOR TORTS OF THEIR LESSEES: See the note to *Ohio etc. R. R. Co. v. Dunbar*, 71 Am. Dec. 295, where this subject is discussed at length; see also *International etc. R. R. Co. v. Dunham*, 2 Am. St. Rep. 484, note 487, collecting other cases.

REYNOLDS v. COOK.

[83 VIRGINIA, 817.]

EJECTMENT FOR INCORPOREAL HEREDITAMENT. — The grant of a right to quarry and remove limestone from land for a specific purpose passes an incorporeal hereditament to the grantee. Such right is an interest in or a right arising out of land, and as such constitutes a foundation for an action of ejectment under the Virginia code.

GRANTOR WHEN ESTOPPED BY DEED WITHOUT COVENANT OF WARRANTY. — Where a deed recites or affirms, expressly or impliedly, that the grantor is seised of a particular estate which the deed purports to convey, and upon the faith of which the bargain was made, he will be thereafter estopped to deny that such an estate was passed to his vendee, although the deed contains no covenant of warranty at all. And such grantor is therefore estopped from setting up an after-acquired title to the estate thereby conveyed.

INSTRUMENTS THAT ARE MUNIMENTS OF TITLE ARE, AS SUCH, COMPETENT EVIDENCE in an action of ejectment.

IN EJECTMENT, PLEA OF NOT GUILTY IS ONLY PLEA ADMISSIBLE IN BAR of the action, in whole or in part; and a paper called a "disclaimer," but in fact a plea in the nature of a special plea in bar, should therefore be rejected.

VERDICT CONTRARY TO EVIDENCE IN EJECTMENT. — Where the declaration in ejectment charges that the defendant unlawfully withholds possession of a tract of land, but the evidence shows that he asserts no other right or interest in the land, or to the possession thereof, than the right to quarry and remove therefrom limestone for a specific purpose, a verdict finding the defendant not guilty is contrary to evidence, and a new trial should be granted on that ground. The verdict, in such case, should be for the plaintiff, except as to the right to quarry and remove limestone.

EJECTMENT by Reynolds against Cook. A tract of land called the Mt. Airy tract was conveyed by the former to the latter, February 23, 1880. On the same day a supplemental agreement was executed by the grantor and grantee, which specified that the grantor reserved the right to harvest and remove a crop of wheat then growing on the land, and declared that "the said Reynolds also grants unto the said Cook the right to quarry and remove all the limestone (free of charge for royalty) that may be required for furnace and agricultural purposes, in connection with the aforesaid Mt. Airy tract of land, from the said Reynolds's land on the opposite side of the river." The tract thus spoken of as being on the opposite side of the river was not then owned by Reynolds, though he declared to Cook that he did then own it. Reynolds acquired title to it by patent from the state in 1885, and soon after brought this action to recover it from Cook. The latter filed a disclaimer, in which he asserted that he did not claim title to the land, nor

any possession or right of possession, "except the right to enter upon said land, and to quarry and remove, free of charge for royalty, all the limestone that may be required by said defendant for furnace and agricultural purposes," etc., in connection with the Mt. Airy tract. At the trial, the supplemental agreement was received in evidence against plaintiffs' objection, and proof was made that defendant, after the execution of that agreement, had exercised the right of entering upon the land, and quarrying and removing stone therefrom. Verdict finding defendant not guilty. Motion for new trial was overruled.

G. W. and L. C. Hansbrough, and H. W. Sheffey, for the plaintiff in error.

Haden and Haden, and Glasgow and Glasgow, for the defendant in error.

LEWIS, P. By the supplemental agreement under seal, of the twenty-third of February, 1880, the right to quarry and remove limestone for certain specific purposes was granted by Reynolds to Cook, which passed to the latter an incorporeal hereditament, provided Reynolds was seised of the land in respect of which the right was granted when the agreement was executed. It was clearly an incorporeal hereditament,—first, because it was not a mere license, as was the case in *Barksdale v. Hairston*, 81 Va. 764, and in other similar cases there cited; and secondly, because it was not the grant of an exclusive right: *Johnstown Iron Co. v. Cambria Iron Co.*, 32 Pa. St. 241; 72 Am. Dec. 783; *Clement v. Youngman*, 40 Id. 341; *Marble Co. v. Ripley*, 10 Wall. 339; note to *McClintock v. Bryden*, 63 Am. Dec. 101, and cases cited. Such a right has been compared to a grant of common *sans nombre*, and is, therefore, an interest in, or a right arising out of, land, and as such constitutes, under our statute, a foundation for an action of ejectment: Code 1873, c. 131, sec. 5; 3 Kent's Com. 419; Tyler on Ejectment, 42.

This is not disputed. The real controversy relates to the effect of the grant in another particular. It appears from the record that when the grant was made Reynolds had no title to the land, and the first and principal question is, whether he is estopped from setting up as against the defendant the title subsequently acquired. He contends that he is not, on the ground that the grant was made without a clause of

warranty, and where there is no warranty, he says, there is no estoppel.

On the other hand, the defendant contends,—1. That the deed to Mt. Airy and the supplemental agreement are virtually one instrument, and therefore, that the covenant of warranty in the deed embraces the mineral right also; and 2. That the plaintiff is estopped independently of the warranty.

As, in our view, the case may be disposed of on the latter ground, that alone will be considered.

The general rule undoubtedly is, that where land is conveyed without warranty, the grantor is not estopped from setting up an after-acquired title. On the other hand, a covenant of warranty works an estoppel, and the reason usually given is, that the estoppel prevents circuitry of action: *Doswell v. Buchanan's Ex'rs*, 3 Leigh, 365; *Gregory v. Peoples*, 80 Va. 355. But this is not the only ground upon which an estoppel arises. The rule is well established that where the deed recites or affirms, expressly or impliedly, that the grantor is seised of a particular estate which the deed purports to convey, and upon the faith of which the bargain was made, he will be thereafter estopped to deny that such an estate was passed to his vendee, although the deed contains no covenant of warranty at all. And the rule accords with common honesty and fair dealing.

The leading case on the subject in this country is *Van Rensselaer v. Kearney*, 11 How. 297, which was ably argued and very fully considered. In that case, a deed was executed by a life tenant conveying his interest in certain lands, which was supposed by the parties at the time to be a fee-simple, and upon that footing the bargain proceeded. Afterwards the grantor acquired the fee, and it was held that he and those claiming under him were estopped by his deed from setting up such after-acquired interest, independently of the covenants in the deed, which were of doubtful import.

In delivering the opinion of the court, Mr. Justice Nelson said: "Where the deed bears on its face evidence that the grantor intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title, in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in

respect to the estate thus described, as if a formal covenant to that effect had been inserted, at least so far as to estop them from ever afterwards denying that he was seised of the particular estate at the time of the conveyance."

He then refers to and reviews a number of authorities, English and American, on the subject, and continues as follows: "The principle deducible from these authorities seems to be, that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after-acquired title as between parties and privies." And the reason, he adds, is, that such affirmation must necessarily have influenced the grantee in making the purchase, and hence, the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it.

"The doctrine," he also added, "is founded upon the highest principles of morality, and recommends itself to the common sense and justice of every one. And although it debars the truth in the particular case, and therefore is not infrequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood, . . . and imposes silence only when in conscience and honesty he should not be allowed to speak."

The doctrine of this case was reaffirmed in *Lessee of French v. Spencer*, 21 How. 228,—a case very similar to the case at bar. There one Fosgit conveyed by deed purporting to convey the fee a certain tract of land without warranty, to which at the time he had not the legal title. Afterwards a patent for the land issued in his name from the federal government, whereby he acquired the legal title; and after his death, in an action of ejectment to recover the land by one of his heirs, against the heirs of his grantee, to whom in the mean time the land had descended, it was held that the plaintiff, claim-

ing under the grantor, was estopped by the deed from disturbing the title or possession of the defendants. "The estoppel," said the court, "works upon the estate, and binds an after-acquired title as between parties and privies." See also *Carver v. Jackson*, 4 Pet. 1, 85; *Batchelder v. Lovely*, 69 Me. 33; *Magruder v. Esway*, 35 Ohio St. 221; *Root v. Crook*, 7 Pa. St. 378; *Clark v. Baker*, 14 Cal. 612; 76 Am. Dec. 449; *Nixon v. Carco*, 12 Miss. 414; *Bush v. Person*, 18 How. 82; Bigelow on Estoppel, 3d ed., 332; 2 Smith's Lead. Cas., 7th Am. ed., 673; notes to *Duchess of Kingston's Case*, 7 Rob. Pr. 419 et seq. See also what is said by the court in *Wynn v. Hannan's Devisees*, 5 Gratt. 164.

These principles apply to the present case, and are decisive of it. The supplemental agreement of the 23d of February, 1880, shows that the right to quarry limestone on the land was embraced in the original contract for the sale of Mt. Airy farm on the opposite side of the river. The consideration expressed in the deed to Mt. Airy is twenty-six thousand dollars, so that the grant of the mineral right was for a valuable consideration. When the sale was made, the plaintiff represented to the defendant that he owned the land, and the fair inference from the record is, that the latter, in consequence of the representations of the former, believed the title was good, and bargained accordingly.

The comprehensive language of the grant, taken in connection with the deed to which it refers, supports this view. The deed conveys the Mt. Airy farm "to the said Cook, his heirs and assigns forever," and the right granted was to quarry limestone for furnace and agricultural purposes "in connection with" that farm. This shows, in the absence of anything to the contrary, that the defendant expected to become invested with an estate in fee. The language of the grant is appropriate to pass an estate in fee, and by implication, at least, affirms that the plaintiff was seised of such an estate. Whether, in addition to this, the defendant, on the faith of the grant, has expended money in the erection of a furnace or otherwise, does not appear. But enough does appear to show very clearly that the attempt of the plaintiff to set up the after-acquired title is not consistent with good faith and fair dealing. And we are of opinion that he is estopped by the grant, construed in connection with the deed, from doing so: *Caldwell v. Fulton*, 31 Pa. St. 475, 489; 72 Am. Dec. 760.

We are also of opinion that the objection to the action of

the circuit court in permitting the deed and the supplemental agreement to be given in evidence to the jury is not well taken. These instruments are muniments of the defendant's title, and as such are competent evidence: *Lessee of French v. Spencer*, 21 How. 228.

There was error, however, in overruling the plaintiff's objection to the filing of the paper called a disclaimer. Technically, it is not a disclaimer, but is in the nature of a special plea in bar, and ought therefore to have been rejected; for in an action of ejectment, the only plea in bar of the action, in whole or in part admissible under the statute, is the plea of not guilty. The defendant, it has been held, may plead in abatement, and may also plead the general issue; but matters in bar of the action can be set up only under a plea of the latter kind: Code 1873, c. 131, sec. 13; *James River and Kansas Co. v. Robinson*, 16 Gratt. 434. It is not easy, however, to see wherein the plaintiff has been injured by the ruling of the circuit court in this particular, and if this were all, the judgment, perhaps, might be affirmed in accordance with the rule acted on in *Danville Bank v. Waddill*, 27 Id. 448; *Snouffer's Adm'r v. Hansbrough*, 79 Va. 166, and in other similar cases.

But this is not all. Another objection is made to the judgment which is insuperable. The plaintiff moved for a new trial on the ground that the verdict was contrary to the evidence, and this motion was overruled. It ought to have been granted. The declaration alleges that the defendant unlawfully withholds possession of the whole of the limestone tract of land, but the evidence, as well as his own admission, shows that he asserts no other right or interest in the land, or to the possession thereof, than the right to quarry and remove limestone therefrom, as granted by the supplemental agreement of the 23d of February, 1880. It also shows that, except as to this right, the verdict ought to have been for the plaintiff, since the statute provides that in an action of ejectment the plaintiff may recover any part or share of the premises, though it be less than what is claimed in the declaration: Code, c. 131, sec. 18. Yet the verdict in effect finds that the plaintiff has no title to and is not entitled to the possession of any part of the premises claimed in the declaration, and hence the judgment entered on the verdict, if permitted to stand, would hereafter conclude the plaintiff and his privies as to the title and right of possession to the whole tract; for the statute, in express terms, enacts that "any such judgment in an action of eject-

ment shall be conclusive as to the title or right of possession established in such action upon the party against whom it is rendered, and against all persons claiming from, through, or under such party," saving to infants and certain other persons under disabilities at the time of the judgment, five years within which to sue after such disabilities have been removed: Code, c. 131, secs. 35, 36.

The judgment will therefor be reversed, and the case remanded for a new trial.

FAUNTLEROY, J., concurred in reversing the judgment, but was further of opinion that the plaintiff was not estopped by the supplemental agreement of 23d of February, 1880, from setting up his after-acquired title.

Judgment reversed.

NATURE OF RIGHT TO MINE is discussed in the note to *McClintock v. Bryden*, 63 Am. Dec. 101.

GRANTOR IN DEED, THOUGH WITHOUT COVENANT OF WARRANTY, is estopped to set up after-acquired title as against his grantee: *Clark v. Baker*, 76 Am. Dec. 449, and note.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

LANG *v.* STATE.

[84 ALABAMA, 1.]

CRIMINAL LAW. — EVIDENCE OF BAD CHARACTER OF DECEASED FOR TURBULENCE AND VIOLENCE is not admissible in favor of the accused in case of homicide, unless the conduct of the deceased at the time of the killing was such as to create in the mind of the accused a reasonable apprehension of great bodily harm. The purpose of such evidence is to show the honesty of the accused's belief of imminent peril.

SAME — CONFESSIONS. — CREDIBILITY OF WITNESSES WHO MAY PROVE CONFESSIONS, and the credibility of the confessions themselves, are legitimate subjects of inquiry, and may be impeached in any authorized mode.

SAME. — THOUGH DEFENDANT MAY HAVE CONFESSED OFFENSE CHARGED, YET HE MAY SHOW that it was not in fact committed, or that he was not the guilty agent. But evidence tending to disprove admissions of incidental and collateral facts, though made by him at the same time, is not admissible to impeach witnesses who testified thereto.

SAME — MURDER IN FIRST DEGREE. — ALABAMA STATUTE, CODE OF 1886, SECTION 3725, DECLARES that "every homicide perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing," is murder in the first degree. And a charge defining the highest degree of murder in these words: "If the defendant, in this county, before the finding of this indictment, purposely killed the deceased by striking him with a base-ball bat, after reflection, with a wickedness or depravity of heart toward the deceased, and the killing was determined on beforehand, even a moment before the fatal blow was struck, the defendant is guilty of murder in the first degree," — contains all the elements of murder in the first degree within the statutory definition.

SAME — WORDS "WILLFUL, DELIBERATE, MALICIOUS, AND PREMEDITATED," USED in the statutory definition of murder in the first degree, may all be grouped under the phrase "formed design."

SAME — ARGUMENTATIVE CHARGE. — ALTHOUGH CHARGE IN REFERENCE TO REASONABLE DOUBT MAY BE OBNOXIOUS TO CRITICISM as being

involved and argumentative, yet, if it asserts correct legal propositions, neither the giving nor the refusal of it is an error which will work a reversal of judgment.

PLEADING AND PRACTICE—CORRECTION OF RECORD.—IN QUOTING THE CHARGE the court inserted the word “heart” where “heat” occurs in the record, regarding and treating it as a mere clerical mistake in copying, which the charge itself corrects.

HOMICIDE. On the occasion of a general fight among excursionists, the deceased, Willie Boyd, was struck in the back of the head with a base-ball bat, and from the effects of the stroke, which fractured the skull, Boyd subsequently died. The deceased, at the time he was struck the fatal blow, was actively engaged in the fight himself, and had previously knocked down two men with a base-ball bat, and was standing over the last man he had knocked down, when some one came out of the crowd and struck the deceased the fatal blow. The man who did it struck a left-handed stroke, holding the bat with both hands, and there was evidence that the appellant Lang was right-handed. There was also evidence tending to show that the deceased had struck the appellant over the head with a stick in the early part of the same fight. The question of fact for the jury was as to the identity of the appellant Lang as the man who struck the fatal blow. The state introduced evidence of a confession by the appellant that he struck the blow, assigning as a cause that he had been struck on the head with a skillet by the deceased some time before. The defendant then offered to prove by one Patton that Patton was the party who had struck Lang with the skillet, but the court would not allow the testimony, and also refused to allow the defendant to introduce evidence of the deceased’s character for turbulence and violence. The charge given by the court defining murder in the first degree, and excepted to by the defendant, appears in the opinion. Another charge in reference to reasonable doubt was as follows: “To prove beyond a reasonable doubt that the defendant is guilty does not mean that the state must make the proof by an eye-witness, or to a positive, absolute, mathematical certainty; this latter measure of proof is not required in any case. If from all the evidence the jury believe that it is possible, or that it may be, or perhaps the defendant is not guilty, this degree of uncertainty does not amount to a reasonable doubt, and does not entitle the defendant to an acquittal. All that is required is, that the jury should, from all the evidence, believe, beyond a rea-

sonable doubt, that the defendant is guilty; and if they so believe, and it was in this county, and before the finding of this indictment, they must find the defendant guilty, although they may also believe, from the evidence, that it may be he is not guilty, or that it is possible he is not guilty." Lang was found guilty of murder in the second degree, and sentenced accordingly.

McCarron and Lewis, for the appellant.

T. N. McClellan, attorney-general, contra.

CLOPTON, J. As a general rule, in cases of homicide, evidence of the bad character of the deceased for turbulence and violence is not admissible, unless it tends to qualify or explain the conduct of the deceased, or to illustrate the motive or intent of the accused in committing the homicide, when it may be said to constitute a part of the *res gestæ*. The character of the deceased, however rash and blood-thirsty, furnishes, *per se*, no excuse for taking his life. To render such evidence competent and relevant, the conduct of the deceased must be of such nature that its tendency, under the circumstances and as illustrated by his character, is calculated to create a reasonable apprehension of great bodily harm. The purpose of such evidence is to show the honesty of the accused's belief of imminent peril: *Franklin v. State*, 29 Ala. 14; *Pritchett v. State*, 22 Id. 39; 58 Am. Dec. 250; *Storey v. State*, 71 Ala. 329; *De Arman v. State*, 71 Id. 357. The deceased, at the time the fatal blow was struck, was making no demonstration of violence against the defendant, spoke no words, and did no act, which could tend, even remotely, to produce in the mind of the defendant any apprehension of harm. Under the circumstances, the evidence of the deceased's character for turbulence and violence was not admissible.

The credibility of the witnesses, who may prove confessions, and of the confessions themselves, are legitimate subjects of inquiry, and may be impeached in any authorized mode. Though the defendant may have confessed the crime, he may show that the offense with which he is charged was not in fact committed, or that he was not the guilty agent. These are the immediate issues to be tried, and any evidence is pertinent which properly tends to prove or disprove them, and to elucidate the main inquiry. But confessions of the specific offense are distinguishable from admissions and declarations of inci-

dental and collateral facts, though they may be made at the same time. An investigation of the truth or falsity of such admissions and declarations would raise collateral inquiries, multiply the issues, and by diverting the minds of the jury from the main inquiry, confuse their deliberations. Had the defendant been allowed to prove, in order to show that his declaration of the cause of his striking the deceased was false, or to impeach the witnesses, who testified to such declarations, that some person other than the deceased struck him with a skillet on a previous occasion, it would have been competent for the prosecution to introduce rebutting and contradictory evidence. An inquiry as to the details of the previous difficulty would have been inaugurated, and the main issue rendered materially dependent upon ascertaining whether the deceased struck the defendant, or whether the defendant had reason to believe that he struck him. The evidence of the witness Patton was properly excluded.

The court, at the request of the solicitor, instructed the jury: "If the defendant, in this county, before the finding of this indictment, purposely killed the deceased by striking him with a base-ball bat, after reflection, with a wickedness or depravity of heart toward the deceased, and the killing was determined on beforehand,—even a moment before the fatal blow was struck,—the defendant is guilty of murder in the first degree."

In quoting the charge, we have inserted the word "heart" where "heat" occurs in the record, regarding and treating its use as a mere clerical mistake in copying, which the charge itself corrects. The statute declares, "every homicide perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing," is murder in the first degree. In *Mitchell v. State*, 60 Ala. 26, it is said that to come within the last clause of the statutory definition "the act must be qualified by each of the named adjectives,"—willful, deliberate, malicious, and premeditated,—which "may be grouped under the very expressive phrase 'formed design.'" Purposely killing is intentional, willful; after reflection is deliberation; with a wickedness or depravity of heart towards the deceased is the highest grade of malice; and determining on the killing beforehand is premeditation. The statute does not fix any length of time as requisite to deliberation or premeditation. If reflected and determined on before the killing, however brief may be the period, the law concludes

a formed design: *Commonwealth v. Drum*, 58 Pa. St. 9. While, as we have said in other cases, it is much the better practice to use the statutory words in defining the highest degree of murder, which cannot be simplified, the foregoing analysis of the charge shows that its hypothesis contains and sets forth, though in different phraseology, all the statutory elements of murder in the first degree: *Floyd v. State*, 82 Ala. 16.

The charge in reference to reasonable doubt asserts correct legal propositions, as settled by several decisions of this court. It may be obnoxious to criticism as being somewhat involved and argumentative; but neither giving nor refusing such charge will cause the reversal of the judgment: *McLeroy v. State*, 77 Ala. 95.

There is no error in the other rulings of the court.

Affirmed.

EVIDENCE OF BAD CHARACTER OF DECEASED IS ONLY ADMISSIBLE IN CASE OF HOMICIDE when the defendant claims to have committed the crime in self-defense: *People v. Garbutt*, 97 Am. Dec. 162, and note; *Harrison v. Commonwealth*, 52 Am. Rep. 634.

MALICE AFORETHOUGHT ESSENTIAL TO PROVE CRIME OF MURDER: See *People v. Potter*, 71 Am. Dec. 763; *Sparks v. Commonwealth*, 96 Id. 196, and notes.

EX PARTE BYRD.

[84 ALABAMA, 17.]

CONSTITUTIONAL LAW.—IT IS CLEARLY WITHIN LEGISLATIVE POWER OF STATE, so far as any limitations resulting from the federal constitution are concerned, to authorize the passage by city councils of ordinances which prohibit the sale of certain commodities, either generally or beyond specified limits, or within certain hours of the day.

1D.—MUNICIPAL ORDINANCE.—IT IS CLEARLY WITHIN COMPETENCY OF OF GENERAL ASSEMBLY, UNDER CONSTITUTION OF ALABAMA, to delegate to a municipal corporation the power to establish public markets, and to confine the sale of commodities, which, in consideration of public health, require police inspection and supervision, to such markets, even if a result of the exercise of this power should be the destruction of an existing and long-established business.

1D.—MUNICIPAL ORDINANCES REGULATING SALES OF COMMODITIES, enacted under legislative authority, must be consistent with general laws, reasonable in their provisions, and referable to the performance of some recognized governmental function.

1D.—MUNICIPAL ORDINANCE, LIKE STATUTE, MAY BE VALID in some of its provisions, and invalid as to others, and a party assailing the ordinance because of the latter must show himself to be affected thereby.

1D. — POWER GIVEN IN CITY CHARTER TO “REGULATE AND MANAGE MARKETS” authorizes the city council to adopt ordinances prohibiting the sale of commodities at stores, stalls, and places in the city outside of the market-houses. While the power “to regulate” does not authorize prohibition in a general sense, yet it confers authority to confine the business referred to to certain hours of the day, to certain localities or buildings in a city, and to prescribe rules for its prosecution within those hours, localities, and buildings.

APPLICATION for writ of *habeas corpus*. The facts appear in the opinion.

R. H. Faith, for the petitioner.

Braxton Bragg, *contra*.

STONE, C. J. The petitioner was convicted by the mayor of Mobile for a violation of a municipal ordinance entitled an “ordinance to establish and regulate markets.” Failing to pay the fine imposed, he was committed to prison, and thereupon he applied to the judge of the city court for a writ of *habeas corpus*, on the ground of the invalidity of said ordinance. This application was denied, and he renews it here.

The ordinance in question provides, among other things, for the establishment and regulation of markets at several points in the city of Mobile, and prohibits the sale of fresh meats at retail outside of these markets, except by tenants of the market stalls, who are permitted to hawk about the streets, after “8 o’clock, A. M., of the day.” This ordinance was in effect on May 1, 1888. The petitioner was then, and had been for a number of years, a green-grocer in Mobile, and as such was engaged in the business of selling fresh meats from his store, having regularly, up to May 2, 1888, paid the municipal license tax imposed on that business; and having offered to continue the payment of this tax. It was admitted that the meats sold by petitioner were sound and wholesome, and that his store was fitted up for this business, and was and had always been clean and neat. Petitioner, on May 1, 1888, between 7 and 8 o’clock, A. M., sold meat at his store in violation of this ordinance. For this he was convicted, and his conviction was assailed below, and its validity is attacked here on the ground that said ordinance is void, because,—1. It is violative of section 1, article 14, of the constitution of the United States; 2. It is violative of sections 1 and 7 of article 1, and section 50 of article 4, of the constitution of Alabama; and 3. That its enactment was not authorized by the charter of the city (or port) of Mobile.

Upon the case, as thus presented, our conclusions are:—

1. That it is clearly within the legislative power of the state, so far as any limitations resulting from the federal constitution are concerned, to authorize the passage by city councils of ordinances which prohibit the sale of certain commodities, either generally or beyond specified limits, or within certain hours of the day. Indeed, the recent adjudications of the supreme court of the United States fully recognize the doctrine that the federal constitution cannot be successfully invoked in limitation of the state's absolute control, either directly or through its political instrumentalities, of its internal police affairs. Both the necessity for police regulation, in a given instance, and the adaptation of a particular regulation to the specific end in view, are matters entirely of state cognizance and final determination. This ordinance, therefore, as applied to the agreed facts, is not violative of any provision of the national constitution: *Mugler v. Kansas*, 123 U. S. 623; *Powell v. Pennsylvania*, 127 Id. 678.

2. The delegation to a municipal corporation of the power to establish public markets, and to confine the sale of commodities which, in consideration of public health, require police inspection and supervision to such markets, is clearly within the competency of the general assembly, under the constitution of Alabama, and it is not conceived that any right secured by the organic law would be impaired by the exercise of this power, even if one of the results of its exercise should be the destruction of an existing and long-established business. Such ordinances, however, must not be inconsistent with general laws; they must be reasonable in their provisions, and referable to the performance of some recognized governmental function.

Deferring, for the present, the inquiry whether the charter of Mobile confers power on the city government to prohibit the sale of meats at any store or stall outside of the market buildings, the question arises, Has the petitioner shown that he is affected by any other provision in the ordinance? It is not shown that he has peddled, or desires to peddle, about the streets. An ordinance, like a statute, may be valid in some of its provisions, and invalid as to others: *Vines v. State*, 67 Ala. 73; *Powell v. State*, 69 Id. 10; *McCreary v. State*, 73 Id. 480. It is not our purpose to inquire into the validity of the clause which discriminates, in the matter of peddling on the streets, between tenants of stalls and those who are not. If

this does vitiate the ordinance to any extent, it is only to the extent of avoiding this exception, or giving to all persons the benefit of it, and allowing others as well as lessees of stalls the privilege of peddling about the streets.

3. This leaves but one inquiry for our consideration, whether the charter power to "regulate and manage markets" authorized the city council of Mobile to adopt ordinances prohibiting the sale of commodities at stores, stalls, and places in the city outside of the market-houses. While the power "to regulate" does not authorize prohibition in a general sense, "for the very essence of regulation is the existence of something to be regulated," yet the weight of authority is to the effect that this power confers the authority to confine the business referred to to certain hours of the day, to certain localities or buildings in a city, and to the manner of its prosecution within those hours, localities, and buildings: *Horr and Bemis on Municipal Police Ordinances*, 32; *Cronin v. People*, 82 N. Y. 318; 37 Am. Rep. 564; *Livery Stables v. State*, 16 Mo. App. 131; *In re Wilson*, 32 Minn. 145.

The ordinance here brought in question is not a prohibition of petitioner's business. It does not deny his right to prosecute it. Its only effect upon that business is to confine it to the public markets, to limit its prosecution to certain hours of the day, and to prescribe rules for its conduct in conservation of public health.

The conviction of the petitioner was not void, his imprisonment thereunder is legal, and the writ of *habeas corpus* is denied.

LEGISLATURE MAY DELEGATE TO MUNICIPAL CORPORATION POWER TO REGULATE CALLINGS, and the municipality, in pursuance of such power, may prevent the sale of certain articles within specified limits: *Ash v. People*, 83 Am. Dec. 740; *St. Paul v. Colter*, 90 Id. 278; and note to *Caldwell v. Alton*, 85 Id. 286-288, in which the power to regulate and manage markets is discussed. In *Cronin v. People*, 37 Am. Rep. 564, it was held that power in a city charter to "regulate the erection, use, and continuance of slaughter-houses" includes the power of total prohibition within the city.

STEINER v. RAY.

[84 ALABAMA, 93.]

CONSTITUTIONAL LAW. — STATUTE REGULATING SALE OF COMMERCIAL FERTILIZERS, if its controlling purpose is to guard the agricultural public against spurious and worthless compounds sometimes sold as fertilizers, and to furnish to buyers cheap and reliable means of proving the deception and fraud should such be attempted, is clearly constitutional.

BILLS AND NOTES — CONSIDERATION. — IT IS SUFFICIENT COMPLIANCE WITH ALABAMA STATUTE, Code of 1886, section 141, requiring one who sells a fertilizer to tag each package sold, if the seller, at the request of the buyer, delivers tags for each package to the latter on his promise to attach them; and a note the consideration of which was a commercial fertilizer so sold is valid.

ACTION on a note. This case involved the constitutionality of certain statutory provisions, incorporated into the Alabama Code of 1886. By these provisions, a department of agriculture was created, and placed under the management of an officer known as the commissioner of agriculture. His duties were to encourage the proper development of agriculture, horticulture, and kindred industries; the organization of neighborhood and county agricultural associations, and out of these associations, a state agricultural association; to collect and publish statistics of benefit in developing the agricultural resources of the state; to cause to be investigated the diseases of grain, fruits, and other crops; the remedies for such diseases, and the habits and propagation of various insects which are injurious to such crops, and the proper mode of their destruction. He was also required to investigate many other matters of interest to agriculturists and horticulturists as well as to stock-raisers. His duties with respect to fertilizers were as follows:—

“He shall, at the opening of each season, issue and distribute circulars, setting forth the brands of fertilizers sold or exchanged, or offered for sale or exchange in the state, their analysis as claimed by the manufacturer or dealer in them, and, so far as known, their agricultural and commercial value. He shall issue a license to such persons as propose to sell or exchange fertilizers. He shall cause tags of suitable material to be prepared, with proper fastenings for attachment to bags, barrels, or packages of fertilizers, and there shall be printed thereon the word ‘guaranteed,’ with the year or season in which they are to be used, and a fac-simile of his signature. He may, at his discretion, obtain a sample of all fertilizers

sold or exchanged, or offered for sale or exchange, in this state, cause them to be analyzed by the state chemist, and make publication of the analysis. He shall make and publish such rules and regulations as he may deem necessary to carry into effect the provisions of this article touching the sale or exchange of fertilizers": Sec. 137.

"SEC. 139. Commercial fertilizers must not be sold or exchanged without a license from the commissioner, authorizing the person making the sale or exchange to deal therein. All sales or exchanges made without such license are void.

"SEC. 140. *License.*—On the payment of a fee of one dollar, the commissioner must issue license to any person or firm or corporation or association of persons, authorizing the sale or exchange of fertilizers during a season, expiring on the thirtieth day of September of each year.

"SEC. 141. The commissioner must furnish the licensee, on application, tags to be attached to fertilizers sold or exchanged, of the kind and description he is required by subdivision 17 of section 137 to prepare, on the payment to him of fifty cents for a number sufficient to tag a ton of fertilizers. Before selling or exchanging, or offering to sell or exchange, fertilizers, the licensee must attach one of the tags to each bag, barrel, or package thereof; and a sale or exchange of fertilizers not so tagged is void.

"SEC. 142. *Fertilizers to be Submitted to Commissioner.*—Before offering a fertilizer for sale or exchange, the person professing to sell or exchange must submit to the commissioner a written or printed statement, setting forth,—1. The name and brand under which said fertilizer is to be sold or exchanged, the number of pounds contained in the bag, barrel, or package in which it is to be put upon the market, the name or names of the manufacturers, and the place of manufacturing; 2. A statement setting forth the amount of the named ingredients which they are willing to guarantee such fertilizer to contain: First, nitrogen; second, water-soluble phosphoric acid; third, citrate-soluble phosphoric acid; fourth, acid-soluble phosphoric acid; fifth, potash; and such statement shall be held to constitute a guaranty to the purchaser that every package of such fertilizer contains not less than the amount of each ingredient set forth in the statement; and when such statement sets forth the maximum and the minimum of any ingredient, the commercial value shall be estimated upon the minimum alone; but this shall not preclude the party from

setting forth any other ingredients which the fertilizer may contain, which, as well as the preceding, shall be embraced in the guaranty.

"SEC. 143. *Fertilizers, or Chemicals for Manufacturing, to be Branded.*—All fertilizers, or chemicals for manufacturing or composting the same, offered for sale, exchange, or distribution, must have branded upon or attached to each bag, barrel, or package, in such manner as the commissioner may by regulation establish, the true analysis of such fertilizer or chemical as claimed by the manufacturer, showing the percentage of valuable elements or ingredients such fertilizer or chemical contains; and in every case the brand must specifically set forth the percentage contained in the fertilizer or chemical of the several ingredients specified in section 142, in the terms of that section.

"SEC. 144. *Fertilizer, What Included in Term.*—The term 'fertilizer,' or 'commercial fertilizer,' as used in this article, does not include common lime, land plaster, cotton-seed, cotton-seed meal, ashes, or common salt, not in combination.

"SEC. 145. *Chemist of Department.*—The professor of chemistry of the Agricultural and Mechanical College is the official chemist of the department. On the application of the commissioner, he must analyze and certify the analysis of all fertilizers, samples of which are furnished him; and, at the request of the commissioner, if he can without conflict with his duties as professor, must attend conventions of agricultural chemists, make reports of such matters as he may deem of interest to the department, and render such other services in the line of his profession as the commissioner may require. . . .

"SEC. 147. *Copy of Official Analysis, Evidence.*—The copy of the official analysis of any fertilizer or chemical, under the seal of the department of agriculture, shall be admissible as evidence in any of the courts of this state, on the trial of any issue involving the merits of such fertilizer or chemical."

Richardson and Steiner, for the appellants.

G. R. Farnham, and Stallings and Wilkinson, contra.

STONE, C. J. The consideration of the note sued on in this case was a commercial fertilizer, sold by appellants to appellees in April, 1884. The act "to establish a department of agriculture for the state of Alabama," approved February 23, 1883 (Sess. Acts, 190), determines the rights of the parties to

this suit: Code of 1886, secs. 129 et seq. The constitutionality of that statute is assailed on many grounds. As we understand the statute, its controlling purpose was to guard the agricultural public against spurious and worthless compounds sometimes sold as fertilizers, to fix on sellers a statutory guaranty that fertilizers sold by them contain the chemical ingredients, and in the proportions represented, and to furnish to buyers cheap and reliable means of proving the deception and fraud should such be attempted. The accomplishment of these objects will greatly promote the prosperity and success of agricultural industry; and we do not hesitate to declare that they are strictly within the pale of legitimate police regulation: Wharton's American Law, secs. 425, 487, 490, and note; Cooley's Constitutional Limitation, 5th ed., 722, 723. We think the statute clearly constitutional.

The record shows the following state of facts: Plaintiffs, Steiner and Sons, were merchants, and, among other merchandise, sold guano to their customers. The defendants applied to them for the purchase of this fertilizer, and were informed that they had none in store, but expected a car-load during the day. The car arrived about 2 o'clock, P. M., and thereupon the written contract declared on was entered into. There is no testimony showing whether or not the guano had been analyzed, and that inquiry does not appear to have been raised in the trial court. The case seems to have gone off mainly on the failure to have tags attached to the packages. The testimony most favorable to the plaintiffs, appellants here, is in substance as follows: When the car arrived, it was soon opened for the delivery of its freight, and defendants, being anxious to leave for home, loaded a ton of the guano from the car upon their wagons. This was done without the direction or knowledge of the plaintiffs or their agent. The agent, coming up, and having the requisite tags in his possession, was proceeding to attach them to the packages on the wagons, ten in number. He had attached them to two or three of the packages, when, at the request of the defendants, and that they might be allowed to leave for home, he gave them the remaining tags, they promising to attach them, and allowed them to depart, carrying with them the fertilizer. As we understand this testimony, if it be believed, the contract of sale was in progress, and did not become completely executed until plaintiffs' agent consented that the defendants might depart

with the guano. Till then the plaintiffs had not relinquished their ownership and control over it.

We have said that the purpose of the statute was to create and furnish evidence of a guaranty of the chemical ingredients of the fertilizer sold. This the statute requires to be done by attaching tags to the several packages. The agent of the seller was proceeding to do this, when, at the urgent request of the buyers, he delivered the tags to them, and permitted them to depart, they promising to attach them. They failed to do so. We hold that this was a substantial compliance with the statute. The sellers committed no fraud on the department of agriculture, for they purchased and paid for the requisite tags. They committed no fraud on the purchasers, for they furnished to them the proper guaranty, and the means of proving it. If the tags were not attached, the fault was not with the sellers. To allow the purchasers to take advantage of this technical omission of duty would be to reward them for the violation of their promise, which we are not inclined to do. Of course, what we have said is based on the testimony as given by plaintiffs' agent. If the jury failed to find the facts as deposed to by him, then the rules declared above do not apply.

This case is distinguishable from *Campbell v. Segars*, 81 Ala. 259. In that case the agricultural department failed to realize its fees for the tags, and the purchasers failed to obtain the statutory guaranty. The purchasers, as further security, might have requested the sellers to draw samples from each package in their presence, but they are not shown to have requested it.

The circuit court erred in the charge given.

Reversed and remanded.

STATE HAS POWER TO REGULATE OR PROHIBIT SALE OR MANUFACTURE of articles of trade, when necessary for the well-being or safety of society: See note on this topic to *Butler v. Chambers*, 1 Am. St. Rep. 644-650.

THORNTON v. SHEFFIELD AND BIRMINGHAM R. R. Co.

[84 ALABAMA, 109.]

CONTRACTS—CONSTRUCTION.—RULE OF INTERPRETATION OF DEEDS OR OTHER INSTRUMENTS, partly printed and partly written, is, that the written parts are presumed to have commanded the stricter attention of the parties; and, in case of irreconcilable conflict, the writing will prevail over the printed matter.

TIME IS ESSENTIAL ELEMENT OF WRITTEN CONTRACT, whereby one person binds himself to convey a right of way to certain other persons, on condition that the latter shall, within four months from the date of the contract, commence the construction of a railroad, and within three years complete it through certain counties; and upon failure to perform these conditions, damages are recoverable for the right of way.

ESTOPPEL.—PERSON IS NOT ESTOPPED TO CLAIM COMPENSATION FOR RIGHT OF WAY by permitting a railroad company to construct its road over his land, and operate it without interference.

INJUNCTION.—BILL IN EQUITY CLAIMING COMPENSATION FROM RAILROAD COMPANY FOR RIGHT OF WAY will be made effective by injunction, if necessary, until the damages are properly ascertained, or until the company obtains the right of way in legal form.

BILL in equity praying compensation for right of way and for an injunction until compensation made. The facts appear in the opinion.

Simpson and Jones, for the appellant.

J. B. Moore, contra.

STONE, C. J. The appellee, railroad company, surveyed its route, and had partially constructed its road, beginning at Sheffield, in Colbert County, and extending southeastward towards Birmingham. When this bill was filed, the road was completed, equipped, and in running order for a distance of forty or more miles in Colbert and Franklin counties, running through the lands of the female complainant after noticed. On the eighth day of October, 1881, Mrs. Thornton,—then Mrs. Henry,—together with her husband, entered into an agreement, partly printed and partly written, a proper interpretation of which is necessary to a decision of this cause. This agreement was signed without witnesses, but was, on the day of its date, acknowledged and certified in form required to convey a homestead, and also to convey lands owned by a married woman: Code of 1886, secs. 1790, 1802, 1894, 2508. The instrument was duly recorded in the proper office. We insert a copy of the contract, italicizing the written words so as to distinguish them from the printed matter. The contract is as follows:—

“Know all men by these presents, that whereas, Eugene C. Gordon, of the state of Mississippi, and his associates, of the states of New York, Georgia, Alabama, Mississippi, and Tennessee, propose to build a railroad from some point on the Alabama Great Southern Railroad, or from some point on the Memphis and Charleston Railroad, into or through the counties of Tuscaloosa, Walker, Winston, Marion, Franklin, Colbert, and Lauderdale, state of Alabama. And whereas, the building of said railroad would, in our opinion, enhance the value of our farming and timbered lands, and the productions thereon; and whereas, the building and operating of said railroad would, in our opinion, become a convenience and advantage in various ways to our property and our labor, in furnishing facilities for transportation and more rapid communication to and from the markets of the country; now, for and in consideration of any or all of these benefits and advantages, which, in our opinion, would accrue to us from the building of said railroad, should the said Gordon and associates, within four months from this date, begin the work of surveying or locating or building said railroad, and shall, within three years from this date, so complete the said railroad so as to have it in operation [to the] *through the counties above named* [county lines between — and — counties]. Now, in that event, in consideration of the said benefits and advantages likely to accrue to us and to our property, as hereinbefore referred to from the building of the proposed railroad: *We, Gus A. Henry and Ella W. Henry*, his wife, of the county of —, state of Alabama, do hereby agree and bind ourselves, our heirs, administrators, executors, and assigns, to make unto the said Eugene C. Gordon and his associates, and upon the compliance of the said Gordon and associates with the terms of this contract [hereby vest the said Gordon and his associates with good and sufficient title to all the coal, iron, coal-oil, in or upon, or in any wise belonging to, the following described lands or real estate, to wit:] *We give the right for the said railroad to enter our plantation, and go through the same in constructing the said road, free of charge, provided it does not interfere with the buildings.*

“[And in addition to the above-described real estate, we hereby bind ourselves and legal representatives to make good and sufficient titles, in fee-simple, to all the following described lands or real estate, to wit: —, together with the right to enter upon the said lands to prospect for said mineral

substances, and to mine and utilize the same if they so desire,] also we hereby grant unto the said Gordon and his associates the right for road and railroads across our lands free of charge, and the free use of timber necessary for railroad or mining purposes.

“It is expressly understood that any and all of the above-specified donations are to be made by the undersigned to aid the said Gordon and his associates in the construction of said railroad, in consideration of the benefits and advantages likely to accrue to us from the building of the same. It is further expressly and specially understood, that no such deed to the lands as above described [or to the coal, iron, coal-oil, and other mineral interests owned by us, as above specified], is to be made, as described in this instrument, if the said Gordon and associates should fail to build such portion of the road, and do the work as is required by the terms of this instrument; nor, on the other hand, the said Gordon and his associates shall not be held liable for damages should they fail to build said railroad.

“The object of thus deeding, or thus binding ourselves to deed certain lands [and our coal, iron, coal-oil, and other mineral interests], on certain conditions, to the said Gordon and his associates, is hereby expressly declared to be, to induce the said Gordon and his associates to build the said railroad,—the consideration to the undersigned being the supposed benefits to accrue to us from the increased circulation of money along the said railroad line in building and operating the same, and the general benefits of our having increased railroad facilities, by which, in our opinion, we will be fully compensated for the said aid extended or to be extended by us in securing the same.” Dated, and signed by Gus A. Henry and Ella W. Henry, with their seals.

In framing this agreement, a printed blank was used, which contained many words and stipulations not germane to the contract made, or intended to be made. We inclose in brackets such stipulations, sentences, phrases, and parts of the same as we think should not be considered in the interpretation of the agreement actually made.

It is a rule of interpretation of deeds or other instruments partly printed and partly written, that the written portions are presumed to have commanded the stricter attention of the parties; and if there is an irreconcilable conflict between them, the writing prevails over the printed matter: 2 Devlin

on Deeds, sec. 837; Bishop on Contracts, sec. 413. This is but the teaching of human experience, crystallized into law.

We are satisfied that in this case there was no intention to contract for mineral rights, or for any easement or privilege in connection therewith. The sole purpose was to obtain a right of way through the plantation of the female complainant, free of charge, and, on like terms, "the free use of timber necessary for railroad purposes."

The contract is not free from ambiguity. It is earnestly contended for appellee that time was not made of the essence of this contract. On the other hand, it is claimed for appellant that the writing is only an agreement to convey, on conditions to be performed within a specified time; and the time having elapsed, and the conditions not being performed, the agreement to convey is canceled. The contract does not employ either of the words "grant, bargain, sell, or convey," or any word of equivalent import. Considering the entire instrument, we hold it not a conveyance, but an agreement to convey, on conditions therein expressed: *Chapman v. Glassell*, 13 Ala. 50. The conditions most important to be noted are the following: To commence the survey of the said road within four months of the date of the contract,—October 8, 1881,—and within three years to complete it, running "into or through the counties of Tuscaloosa, Walker, Winston, Marion, Franklin, Colbert, and Lauderdale, state of Alabama." The clause which binds Henry and his wife—the latter now Mrs. Thornton—is in the following terms: "Now, in that event, . . . we, Gus A. Henry and Ella W. Henry, his wife, do hereby agree and bind ourselves, our heirs, administrators, executors, and assigns, to make unto the said Eugene C. Gordon and his associates, and upon the compliance of the said Gordon and his associates with the terms of this contract, hereby [agree to] vest the said Gordon and his associates with good and sufficient titles, . . . we give the right for the said railroad to enter our plantation and go through the same, in constructing said road, free of charge, provided it does not interfere with the buildings." There are other provisions in the contract clearly indicating that it was not intended as a conveyance, but only as an agreement to convey. Among them is the following: "It is further expressly and specially understood that no such deed to the lands as above described . . . is to be made, as described in this instrument, if the said Gordon and associates should fail to build

such portion of the road, and do the work as required by the terms of this instrument." Under the force of the clauses copied, and other provisions of the contract, we feel authorized to insert the words "agree to," which we have placed between brackets above.

We hold that, under the terms of this contract, the complainant bound herself to give and convey the right of way only in the event Gordon and associates, or their assigns, performed the stipulations they entered into, and which constituted the consideration of complainant's agreement to convey: *Tennessee etc. R. R. Co. v. East Alabama R'y Co.*, 73 Ala. 426, 440. We hold, further, that the agreement in this case makes time an essential element of the contract, and Gordon and associates, having broken the agreement on their part, have forfeited all right to claim its observance on the part of complainant.

It is contended for appellee that by permitting the railroad company to construct its road and operate it without interference, complainant has estopped herself from now asserting her right to compensation for the right of way. There is no principle of estoppel against this claim, considered as a mere demand for damages for the right of way. If she were seeking to evict the corporation, there might be something in the objection. That is not the purpose of this suit. She claims only for the injury done to her freehold; and that claim, under the averments of the bill, stands on the same meritorious ground as if the road had been built without prior attempt to procure or condemn the right of way. Such acquiescence, to operate a bar, must be of sufficient duration to toll entry: *New Orleans etc. R. R. Co. & Ins. Ass'n v. Jones*, 68 Ala. 48; *Jones v. New Orleans etc. R. R. Co.*, 70 Id. 227; *Tennessee etc. R. R. Co. v. East Alabama R'y Co.*, 73 Id. 426; 1 Wood's Railway Law, sec. 209; *Perkins v. Maine Cent. R. R. Co.*, 72 Me. 95.

The course adopted by the complainant in this case is fully justified by the authorities, and the bill should be retained and made effective by injunction, if necessary, until the damages are properly ascertained, or until the railroad company obtains the right of way in legal form: *Taylor v. C. R. & St. P. R. R. Co.*, 25 Iowa, 371; *Browning v. Cam. & W. R. R. Co.*, 4 N. J. Eq. 47; *Gilman v. S. & F. R. R. Co.*, 40 Wis. 653; *Rush v. M. L. S. & W. R'y Co.*, 54 Id. 136; 2 Wood's Railway Law, sec. 246.

The present suit was instituted in July, 1887. At that

time, and since February 28, 1887, "the wife must sue alone, at law, or in equity, . . . for the recovery of her separate property, or for injuries to such property": Act approved February 28, 1887, Sess. Acts 1880, sec. 7; Code of 1886, sec. 2347.

The chancellor erred in sustaining the eighth ground of demurrer, and there is nothing in the other grounds assigned. Rule of chancery practice, No. 13, in the Code of 1876, same number in Code of 1886, has no application to bills which contain no interrogating part, and, like the forms of the complaints given in the code, is at most directory: Code of 1886, sec. 3422.

The decree of the chancellor is reversed, and a decree here rendered overruling the demurrer. The decree appealed from being interlocutory, the cause is still pending in the court below, and there is no need of an order of remandment.

Reversed and rendered.

TIME IS NOT OF ESSENCE OF CONTRACT unless there are words clearly showing that to be the intention: *Taylor v. Baldwin*, 73 Am. Dec. 736.

PARTY SEEKING TO RECOVER DAMAGES IN CONDEMNATION PROCEEDINGS MAY HAVE INJUNCTION until the damages are paid: *Lafayette etc. Co. v. New Albany R. R. Co.*, 74 Am. Dec. 246, and note.

PORT OF MOBILE *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

[84 ALABAMA, 115.]

GRANT, IN ITS OWN NATURE, AMOUNTS TO EXTINGUISHMENT OF RIGHT OF GRANTOR, and implies a contract not to reassert that right, and this principle is applicable to franchises lawfully granted by municipal corporations.

RAILROAD COMPANY — GRANT OF FRANCHISE TO BY CITY AS AGENT OF STATE. — A railroad company was authorized under its original charter, granted by the legislature, to construct its road across or through any street or highway, subject to the limitation that the public use of such street or highway should not be unnecessarily impaired. An amendment to this charter authorized any incorporated city or village within the state, and situated upon the line of the company's road, to grant to the company any rights, privileges, or franchises having reference to the construction and management of its road, and the conduct of its business, within the limits of such city. Under the authority thus conferred in the charter of the company, a grant to it by a city, in the form of an ordinance, of the right to construct a track with necessary sidings and turn-outs through a business street in said city, in such manner as the

company might deem necessary for its business purposes, is an irrevocable franchise, protected from impairment by both federal and state constitutions, and subject to the limitation only that the use of the street by the public should not be unnecessarily or materially impaired.

ID. — **PRIVILEGE GRANTED TO RAILROAD COMPANY TO LAY ITS TRACK THROUGH BUSINESS STREET OF CITY**, with the necessary sidings and turn-outs, these to be laid in such manner as the company might deem expedient and necessary for its business, is none the less a franchise, in the proper sense of that term, because it was granted, not directly by legislative enactment, but by the city authorities, under the sanction of the company's charter, itself granted by the legislature. For this purpose the city is regarded as a political agent for the state, and an act done by the state through its duly authorized agent is an act done by the state itself.

ID. — **RIGHT GRANTED TO RAILROAD COMPANY TO LAY ITS TRACK THROUGH CITY STREET NECESSARILY IMPLIES** the right to use such track in the mode ordinarily adopted by railroad companies, subject to reasonable regulation under the police power of the proper authorities. The right to lay side-tracks and turn-outs in like manner implies the right to use them, and this includes their use for the transportation of goods to and from adjoining stores and warehouses.

CORPORATIONS. — **CHARTERS OF CORPORATIONS ARE TO BE CONSTRUED** STRICTLY against the corporators, and what is not unequivocally granted in clear terms, or necessarily implied, must be taken to be withheld.

ID. — **PRACTICAL CONSTRUCTION OF GRANT ESTABLISHED BY YEARS OF UNIFORM USAGE**, acquiesced in by the public, and not denied by those adversely interested, is the strongest evidence that the grant has been rightly interpreted.

ID. — **CITY ORDINANCE HAVING FOR ITS OBVIOUS PURPOSE** the destruction of an irrevocable franchise belonging to a railroad company, no question of police power, abatement of nuisance, or regulation of an admitted right being involved in the case, is void.

INJUNCTIONS. — **COURT OF EQUITY HAS JURISDICTION TO ENJOIN ENFORCEMENT OF CITY ORDINANCE**, having for its purpose the destruction of the franchise of a railroad company, in which the public has an interest, where the injury to the company will be irreparable; and the company is not required to establish its right at law before invoking the aid of equity, its right being clear and free from doubt, the validity of the franchise depending upon the construction of a grant from the city, authorized by the company's charter.

ID. — **COURT OF EQUITY WILL NOT INTERFERE TO ENJOIN MERE TRESPASS** of ordinary character, either upon the person or property. But where a trespass, or a series of trespasses, operate in effect to destroy or seriously impair the exercise of a franchise, a court of equity will not hesitate to interpose to prevent the apprehended injury by the aid of injunction.

ID. — **COURT OF EQUITY WILL NOT REFUSE TO INTERFERE BY INJUNCTION** to restrain a city from unlawfully attempting, by an ordinance, to destroy the valuable franchise of a railroad company merely because the ordinance is of a *quasi* criminal character.

BILL in equity for an injunction. The facts appear in the opinion.

R. H. Clarke, for the appellant.

Gaylord B. Clark and F. B. Clark, Jr., contra.

SOMERVILLE, J. The present bill is filed by the Louisville and Nashville Railroad Company against the Port of Mobile to enjoin the enforcement of an ordinance of that municipality, which declared it unlawful for any person or corporation to load or unload cars in the public streets of the city, under a penalty of not less than twenty-five dollars for each and every violation of the provision. The ordinance excepts cotton, coal, and ice in certain localities, but this exception has no material bearing on the present controversy.

The bill claims for the complainant a vested franchise to exercise the right of loading and unloading freight along the line of its track constructed through Commerce Street in said city, and that the enforcement of the ordinance in the manner which has been threatened by the municipal authorities will operate as a total destruction of this valuable franchise, which the company had been peaceably exercising for about eighteen years. It is averred that the ordinance in controversy is the exercise of unauthorized municipal power, and is therefore void; and that the defendant corporation, the Port of Mobile, is insolvent, and the public officers and others who have undertaken to enforce the ordinance, by the threatened arrest of the complainants' employees, are pecuniarily irresponsible, and facts are stated from which it is made clear that the injury which will be suffered by the complainant in the abrogation of this right, and the consequent paralysis of its business, will be irreparable, and cannot be recompensed by suits for damages at law.

We first inquire as to the origin and nature of the right or privilege claimed by the complainant; second, whether the ordinance in question operates as an illegal interference with it; and third, as to the jurisdiction of a court of equity to interfere by the aid of injunctive relief.

1. The basis of the alleged right in the complainant is, a grant by the city of Mobile, in the form of an ordinance, passed in September, 1869, for the particular purpose, as the bill alleges, of enabling the railroad to reach the stores and warehouses situated on Commerce Street,—this grant being made under the authority of the charter of the railroad company, created by legislative enactment. The complainant, as the owner of the charter of the New Orleans, Mobile, and

Chattanooga Railroad Company, is shown to be entitled to all the rights vested in that corporation. The charter of the latter company, enacted in November, 1866, expressly authorized the construction of its road across or through any street or highway, the only limitation upon the right being that the usefulness and convenience of such street or highway to the public should not be unnecessarily or materially impaired: Acts 1866-67, pp. 6-15, sec. 13. An amendment to this charter, approved February 12, 1867, contained the following provision: "That the said company is hereby authorized and empowered to obtain, by grant or otherwise, from any incorporated city or village within the state that may be situated upon or at the intersection or termini of any of its railroads, any rights, privileges, or franchises that any of said incorporated cities or villages may choose to grant in reference to the construction, maintenance, and management of the railroad of said company, its depots, cars, locomotives, and its business within the limits of such incorporated city or village, as hereinafter named, is hereby authorized and empowered to grant to said company any such rights, privileges, and franchises as it may deem proper and advisable; and such privileges and franchises, when granted to and accepted by said company from any such incorporated city or village, shall be deemed and taken as rights, privileges, and franchises vested and confirmed in said company, and not liable thereafter to be revoked, changed, injured, or impaired, except with the consent of said company": Acts 1866-67, p. 400, sec. 5.

That the legislature, under the general police power inherent in the state, had the constitutional power to authorize the city of Mobile to grant the right to construct a railroad track, upon which steam-engines are operated, across and through the streets of that city, must be conceded. And after such permission, it would lie in the mouth of no one to complain that the changed use of the street would *per se* be a nuisance: *Perry v. New Orleans, Mobile, and Chattanooga R. R. Co.*, 55 Ala. 413; 28 Am. Rep. 740.

Under the authority thus conferred in the charter of the company, the city of Mobile, on September 7, 1869, passed an ordinance by which it "granted" to the railroad the right of way through certain streets, including "also the right to lay a single track, with the necessary sidings and turn-outs, from the northern boundary of its depot, . . . through Commerce

Street, in such manner as said company may deem expedient and necessary for its business and interests."

Upon the faith of this grant the track of the road was constructed through Commerce Street, with the necessary sidings and turn-outs, for the purpose of loading and unloading freight and merchandise into and from the various stores and warehouses located upon said street; and has been ever since continuously used for this purpose from day to day, without complaint or objection from any source, for a period of seventeen or eighteen years, until the attempted revocation of the ordinance in December, 1886.

The privilege thus granted is obviously a franchise of the most valuable kind, being one of the most common examples of such a grant or privilege: *Davis v. Mayor*, 14 N. Y. 506; 67 Am. Dec. 186, 193. It is certainly a "right, privilege, or franchise" within the meaning of the company's charter, having reference, as it does, to the construction and management of the railroad, and the conduct of its business of transportation within the limits of the city of Mobile. Such a special privilege conferred directly by legislative enactment, or in a mode provided for by such enactment, becomes a contract between the state and the corporators, and as such, has always been protected from impairment by legislative action by virtue of both the federal and state constitutions, each of which prohibits the passage of any law by which the obligation of existing contracts is impaired or lessened: *City of Burlington v. Burlington Street R'y Co.*, 49 Iowa, 144; 31 Am. Rep. 145. "A grant in its own nature," observes Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch, 87, 137, "amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right,"—a principle which has been held in this state to be applicable to franchises lawfully granted by municipal corporations: *Stein v. Mayor etc. of Mobile*, 49 Ala. 362; 20 Am. Rep. 283. The charter itself declares, moreover, that when once granted, in the mode provided for, such privilege should become a vested and irrevocable right, not liable to be revoked or impaired in any manner: Acts 1866-67, p. 400, sec. 5. It was not until the present constitution of 1875—now in force in this state—went into operation that irrevocable grants of special privileges of this nature were prohibited: *Birmingham Street R'y Cases*, 79 Ala. 469.

2. The privilege in question is none the less a franchise, in the proper sense of that term, because it was granted, not

directly by legislative enactment, but by the municipal authorities of Mobile under the sanction of the charter, which is itself a legislative enactment. The grant by the city without such sanction would be unauthorized by law and void. It is therefore referable to the charter, and may be considered as a grant by the legislature on the condition precedent that the corporate authorities of Mobile should assent to it, that municipality being regarded as a political agent for the state for this purpose, as it is for other governmental and police purposes. A case strongly analogous may be found in the grant of a license by the court of county commissioners, under the authority of the statute, to establish a toll-bridge, or a ferry, which have been held by this court to be privileges in the nature of legislative franchises, granted directly by the state, and subject in general to be governed by the same principles: *Harrell v. Ellsworth*, 17 Ala. 576; *Gates v. McDaniel*, 2 Stew. 211; 19 Am. Dec. 49; *Mayor v. Rodgers*, 10 Ala. 37, 49; *Birmingham Street R'y Cases*, 79 Id. 465. This principle seems to us to be based on sound and practical reason, and is essentially just in its results. It is a mere logical sequence of the common adage, *Qui facit per alium, facit per se*. An act done by the state through its duly authorized agent is an act done by the state itself.

3. The chancellor decided that the grant made by the city to the appellee conferred, by necessary implication, not only the right of transit through Commerce Street, but the right to load and unload at the adjacent stores and warehouses. In this conclusion, we are disposed to concur, notwithstanding the force of the rule that the charters of corporations are to be construed strictly against the corporators, and what is not unequivocally granted in such acts must be taken to be withheld. The power claimed must, in other words, be granted in clear terms, or else must be necessarily implied: *Birmingham Street Railway Cases*, 79 Ala. 472. It has been held by a respectable and learned court that the grant to a railroad company of the mere right of transit through the streets of a city would carry as a necessary incident the right to load and unload merchandise, provided ample room was left to accommodate public travel on the street, and the time occupied in exercising the right was reasonably short: *Matthews v. Kelsey*, 58 Me. 56; 4 Am. Rep. 248. The present case does not require us to carry the principle so far. Here the railroad already possessed the naked right of transit. This had been

conferred and directly by legislative enactment, as declared in the original charter. The amendment to the charter would seem, therefore, to have in view the giving of some additional right or privilege. It would otherwise have been useless. The language of the city ordinance bears out this view. It not only confers the right to lay the main track through the street, thus confirming what the company already had, but it goes further by adding, "with the necessary sidings and turn-outs," and these to be laid in such manner as the railroad company might deem "expedient and necessary for its business and interests." Why, we may ask, give the power to lay these "sidings and turn-outs" along the streets, and within the company's discretion, if the right to use them was to be withheld? The right to lay a track through a street implies, by necessary implication, the right to use such track in the mode ordinarily adopted by railroad companies, and subject to reasonable regulation under the police power of the proper authorities. The right to lay side-tracks and turn-outs in like manner implies the right to use them; and the only use which could be reasonably contemplated by their construction is for the transportation of goods to and from the adjoining stores and warehouses. Add to this the significant fact that the railroad company, after being placed in possession of its franchise, construed it to confer this right, and exercised it uniformly without complaint or interruption for between seventeen and eighteen years. A contemporaneous construction of a law is of very high authority. The practical exercise of a right under it, acquiesced in by the public, and not denied by those adversely interested, is the strongest evidence that it has been rightly interpreted. The practical construction thus established by years of uniform usage is often allowed by the courts, even in doubtful cases, to have the force of settled law. A like rule prevails in the construction of contracts, the court being always strongly inclined to interpret every agreement as the parties themselves have done by practical usage, regarding their conduct in the every-day execution of its terms as an agreed interpretation of them.

Our conclusion is, that the railroad company was possessed of an irrevocable franchise, conferred by the city ordinance, giving it the right to load and unload freight at its sidings and turn-outs constructed on Commerce Street, subject to the limitation only that the use of the street by the public should not be unnecessarily or materially impaired.

4. The ordinance of December, 1886, here sought to be enjoined, is a manifest attempt to abrogate this privilege by declaring its exercise unlawful, and fixing a penalty to it. The announced determination of the police authorities to arrest all employees of the road who seek to exercise the franchise, if executed, must operate its utter destruction. The allegations of the bill, which the demurrer admits to be true, negative all facts from which it is possible to suppose that the purpose of the objectionable ordinance was to abate a nuisance. There is no sort of pretense that it was a mere police regulation. There is no complaint on the subject from those most interested in the use and occupancy of the highway. It comes from those who neither are property holders nor engaged in business there. Facts, moreover, are averred from which it seems clear that the loading and unloading of cars of freight by the railroad along the street, so far from seriously obstructing travel and traffic by the public, greatly facilitate the convenient use of the streets for these purposes by relieving it of the burden of being constantly crowded with drays and other vehicles. The case, therefore, raises no question as to a resort to the police power of the city or state to abate an alleged nuisance, or as to an attempted regulation of an admitted right. The purpose of the defendant corporation is obviously to destroy the franchise which it has conferred; and the ordinance under consideration, having this effect, if executed, must be held to be void.

5. The jurisdiction of a court of equity to protect a franchise of this kind from unlawful invasion or disturbance is clearly settled, and has been often recognized by this court as benign and salutary. The value of such a right, or the cost of its unlawful disturbance, cannot be reduced to a pecuniary measure. When the purpose is its utter destruction, the duty to protect becomes correspondingly more urgent and imperative. The ground of its exercise is usually the prevention of irreparable injury, or such as cannot be adequately estimated in damages at law; at other times, the avoidance of a multiplicity of suits, and again the abatement of annoyance in the nature of a legal nuisance. Another controlling reason for interference by equity in such cases is, that the public at large have an interest in the protection of such a privilege as well as the parties particularly interested: *Broadway Stage Co. v. Amer. Society etc.*, 15 Abb. Pr., N. S., 51. The party aggrieved is not required to establish his right at

law before he is permitted to invoke the aid of equity, if such right is clear and free from doubt. The verdict of a jury is only necessary where the right claimed is doubtful. The right is here determined by a municipal ordinance in the nature of both a grant and a contract, which is in writing. Its construction is for the court, and not for the jury: *Mayor v. Rodgers*, 10 Ala. 37; *Croton Turnpike Co. v. Ryder*, 1 Johns. Ch. 611; *Harrell v. Ellsworth*, 17 Ala. 576; *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101; 9 Am. Dec. 274; *Commonwealth v. Pittsburgh etc. R. R. Co.*, 24 Pa. St. 159; 62 Am. Dec. 372; *Attorney-General v. Heishon*, 18 N. J. Eq. 410; 2 Dillon on Municipal Corporations, sec. 907.

6. It is too clear for argument that it is no objection to the exercise of this jurisdiction that the attempted invasion of the franchise sought to be protected is accompanied by acts which are personal trespasses. A court of equity will not, it is true, interfere to enjoin a mere trespass of an ordinary character, either upon the person or property. The remedies afforded at law are deemed adequate in cases of this kind: *Montgomery etc. R. R. Co. v. Walton*, 14 Ala. 207. But the cases are numerous in which the arm of this court has been successfully invoked to enjoin trespasses, which, if unrestrained, would probably result in irreparable mischief, or where such mischief might be completely effected before a trial at law could be had as to the controverted right. Judge Story thus states the rule: "If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, they were extremely reluctant to interfere at all, even in regard to repeated trespasses. But now there is not the slightest hesitation if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If, indeed," he concludes, "courts of equity did not interfere in cases of this sort, there would be a great failure of justice in this country": 2 Story's Eq. Jur., sec. 928. The chancery court of England had come up to this advanced view of the law as early as the days of Lord Hardwicke: *Coulson v. White*, 3 Atk. 21. And this view is now supported by an unbroken array of uniform authorities, speaking with one voice on the subject: *Jerome v. Ross*, 7 Johns. Ch. 315; 11 Am. Dec. 484, note 498-507; *Lyon v. Hunt*, 11 Ala. 295; 46 Am. Dec. 216; *Scudder v. Trenton etc. Co.*, 23 Id. 756; *Poindexter v.*

Henderson, 12 Id. 550; *Burnley v. Cook*, 13 Tex. 586; 65 Am. Dec. 79; *White v. Flannigan*, 1 Md. 525; 54 Am. Dec. 668. The case of *Osborn v. United States Bank*, 9 Wheat. 738, is a familiar and high authority, from one of the greatest judges, for the position that where a trespass, or a series of trespasses, operate in effect to destroy or seriously impair the exercise of a franchise, a court of equity will not hesitate to interpose to prevent the apprehended injury by the aid of injunction. And in *Broadway Stage Co. v. Amer. Society etc.*, 15 Abb. Pr., N. S., 51, it is expressly held that an injunction would lie to restrain the persistent commission of trespasses of a mere personal nature, where they affect a corporate franchise. And the same principle has been recognized by this court in a case where it was sought to enjoin the enforcement of a municipal ordinance, the violation of which was attended with a penalty: *Moses v. Mayor etc. of Mobile*, 52 Ala. 198.

The equity of the present bill can be supported upon the ground that the court will lend its aid to prevent the destruction or serious impairment of a vested franchise, the value of which cannot be adequately estimated in damages. The case is strengthened by the further consideration of preventing expensive and vexatious litigation accompanied by a multiplicity of suits, and the insolvency of the defendants, by whom the alleged grievances are threatened,—facts which strongly corroborate the alleged inadequacy of any legal remedy open to the complainant in the courts of law. The records of our courts present few cases of threatened injury so irreparable in nature, or for which a verdict of damages at law would furnish so inadequate compensation: *Jerome v. Ross*, 7 Johns. Ch. 315; 11 Am. Dec. 484, note 500–507.

7. The suggestion that the court, under the peculiar circumstances of this case, must abdicate this jurisdiction because of the fact that it is dealing with an ordinance of a municipal corporation of a *quasi* criminal character, the violation of which is made an offense, does not strike us favorably. The power to prevent irreparable injury, flowing from the deficiencies and injustice of the more technical rules of the common law, may be said to be the very life of equity jurisdiction. The court must, therefore, be jealous of its preservation, notwithstanding it may also be cautious in its exercise. Municipal corporations can claim no exemption from being subjected to it. They must stand in our courts upon terms of equality with all other corporations, and with natural persons. Our

constitution declares that "all corporations shall have the right to sue, and shall be subject to be sued in all courts, in like cases as natural persons": Const. 1875, art. 14, sec. 12. The legal effect of this provision is to place municipal corporations, as nearly as practicable, upon a basis of equality in the enforcement and defense of their rights in courts of justice in this state: *South and North Alabama R. R. Co. v. Morris*, 65 Ala. 193; *Davis v. Mayor*, 1 Duer, 452. And the rule accordingly must apply with peculiar force with us, which is said by Mr. Dillon to be generally recognized elsewhere, that "equity will interfere in favor of or against municipal corporations on the same principles by which it is guided in other cases": 2 Dillon on Municipal Corporations, sec. 908.

It cannot be tolerated that a municipal corporation, in view of these principles, should escape the grasp of a court of chancery, in a clear case of equitable cognizance, by the device of adding a penalty to an illegal and void ordinance, which is designed as a repudiation of its own valid grants or contracts, especially in a case where the public are largely concerned, and a court of law can afford no remedy adequate for the prevention of irreparable injury that would probably result from the enforcement of such an ordinance.

There is nothing in the case of *Burnett v. Craig*, 30 Ala. 135, 68 Am. Dec. 115, which is in conflict with the foregoing views, as will appear from the later case of *Moses v. Mayor etc. of Mobile*, 52 Ala. 198. The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights: 1 High on Injunctions, sec. 20; *Mayor etc. of Baltimore v. Radecke*, 49 Md. 217; 33 Am. Rep. 239; *Third Avenue R. R. Co. v. New York*, 54 N. Y. 159; *Mayor etc. of Mobile v. Waring*, 41 Ala. 139; 8 Wall. 110.

The decree of the chancellor refusing to dismiss the bill for alleged want of equity, and refusing to dissolve the injunction, is in harmony with the foregoing views, and must be affirmed.

IRREPARABLE INJURY WITHIN MEANING OF LAW OF INJUNCTIONS is the title of the note to *Dudley v. Hurst*, 1 Am. St. Rep. 374-379.

IN *Forcheimer & Co. v. Port of Mobile*, 84 Ala. 126, the complainants, wholesale merchants, doing business on and near the street upon which the

railroad track runs, sought to enjoin the enforcement of the ordinance discussed in the principal case. But it was held that under the principles settled in the principal case, and the case of *Burnett v. Craig*, 30 Ala. 135, 68 Am. Dec. 115, the facts stated in the complainants' bill did not present a case of irreparable damage threatened by the enforcement of the ordinance sought to be enjoined, and no question being involved as to the protection of a franchise, the bill could not be sustained. It would be necessary for the complainants to first establish the invalidity of the ordinance in question by the judgment of a court of law, before invoking the injunctive aid of a court of equity.

But the principal case is cited as settling the right of a court of chancery to assume jurisdiction of a case, the purpose of which is to protect an alleged corporate franchise from repeated and embarrassing disturbances resulting from the threatened enforcement of a municipal ordinance, which is asserted either to be void, or else to have no application to the particular case, in *City Council v. Louisville etc. R. R. Co.*, 84 Ala. 127. In this case, the railroad company filed a bill in equity seeking to enjoin the city authorities from interfering with the erection or enlargement of necessary depot buildings, which the railroad company was required by statute to provide for the accommodation of the traveling public. The enlargement proposed was an addition to a brick depot building, which addition was to be two stories high, constructed of wooden frame-work, resting on brick pillars, and covered on the outside with corrugated iron. The city authorities claimed this addition to be a violation of the ordinance in question, which prohibited the erection of any wooden buildings within certain designated limits. But the court held that the extension or enlargement of the complainant's brick depot building in the manner described did not fall within the prohibitions of the ordinance. The ordinance, being penal in its nature, should be strictly construed against the municipal authorities, and adopting such a construction, the act of the complainant corporation did not fall within the terms of the ordinance, and was not violative of its provisions. Therefore, "the chancellor did not err in refusing to dissolve the injunction granted to prevent the threatened enforcement of the ordinance against the complainant or its authorized agents, who were concerned in making the depot enlargement."

GRANT OF FRANCHISE BY MUNICIPAL CORPORATION IMPLIES A CONTRACT not to reassert the right to what was granted: *Stein v. Mobile*, 20 Am. Rep. 283, and *Burlington v. Burlington S. R'y Co.*, 31 Id. 145. In the latter case the court hold that a municipal corporation having granted a railroad company a franchise for a double track cannot afterwards confine it to the use of a single track.

POWER OF STATE, OR OF MUNICIPALITY AS ITS AGENT, TO AUTHORIZE USE OF STREET BY RAILROAD, is discussed in the note to *Williams v. N. Y. Cent. R. R. Co.*, 67 Am. Dec. 662-665; and see *Hinchman v. Paterson R. R. Co.*, 86 Id. 252.

CORPORATE CHARTERS ARE TO BE CONSTRUED AGAINST THE GRANTEES: *Monongahela B. Co. v. Kirk*, 84 Am. Dec. 527, and note.

ALABAMA GREAT SOUTHERN R. R. Co. v. ARNOLD.

[84 ALABAMA, 159.]

RAILROAD COMPANY. — ALTHOUGH, IN ABSENCE OF STATUTORY REQUIREMENT, IT MAY NOT BE DUTY of railroad company to erect a ticket-office and depot at a station on its road, yet, having done so, and thereby invited persons having business with it to enter for its transaction, the law requires that the building shall be adapted to the purpose, and that the approaches thereto shall not be unsafe. But the duty of the company to maintain a light at its depot in the night-time is limited to the arrival and departure of trains, and for a sufficient time before and after to enable persons to enter cars or alight therefrom, without undue haste, so as to secure safety.

RAILROAD COMPANY IS TO BE REGARDED AS FREE FROM BLAME, when, in the administration of its affairs, it conforms to the rules generally in use by other prudently conducted companies, unless it violates or disregards some positive requirement of the law, and thereby inflicts an injury.

DAMAGES. — EXEMPLARY DAMAGES ARE RECOVERABLE, IN PROPER CASE, ALTHOUGH NOT SPECIALLY CLAIMED, in the complaint in an action against a railroad company seeking the recovery of damages for personal injuries. But if the injuries resulted from simple negligence only, as contradistinguished from gross negligence, exemplary damages cannot be recovered.

PLEADING AND PRACTICE. — IF TESTIMONY ESTABLISHES TRUTH OF MATERIAL AVERMENTS IN PLEA, on which the plaintiff took issue, without objection, the defendant is entitled to a verdict, whether the plea was sufficient or not.

CONTRIBUTORY NEGLIGENCE, QUESTION OF, PROPERLY SUBMITTED to the jury under the circumstances of the particular case.

ACTION against the Alabama Great Southern Railroad Company to recover damages for personal injuries sustained by the plaintiff, Arnold, and alleged to have been caused by the negligence of the defendant in failing to have its station supplied with a light. The material facts appear in the opinion.

Samuel F. Rice, Wood and Wood, and Thomas R. Roulhac, for the appellant.

James B. Head and J. J. Altman, contra.

STONE, C. J. This case was before us at a former term: 80 Ala. 600. The complaint consisted of two counts, one the original, and the other an amendment, adding a second count. The complaint is the same now as on the former appeal. On that appeal we held that the *gravamen* of each count was the same,—the failure to have the depot supplied with a light. The first or original count predicates negligence on the part of the railroad, on the naked averments that Boligee was one

of its stations for receiving and discharging passengers; that at that station the railroad had erected a platform, and thereon its only ticket-office at that place; that plaintiff, desiring to take passage on its train, soon to arrive, had entered the office and procured a ticket; that it was night-time, very dark, and no light furnished; that the train "was about arriving"; and that the "plaintiff attempted to descend the steps of said platform for the purpose of entering the car, and in attempting so to do, fell and thereby received severe personal injuries." The count then avers that "said fall and injuries were caused by the negligence of defendant, or its servants, in failing to provide a light at said station, whereby plaintiff would have been able to see his way, and avoid said fall and injuries."

The amendment, or second count, differs from the first only in the following additional averments, giving a more minute description of the place where the injury was suffered: "That said office had in front of and attached to it, fronting its entrance, a platform about three and one half feet wide, which was accessible by steps about three and a half feet in width, reaching from the ground to the top of the platform in front of the door of said ticket-office, over which steps and platform passengers were required to pass in entering the ticket-office. The surface of said platform was elevated about four or four and a half feet above the ground; and plaintiff avers that the construction of said steps and platform, as above described, rendered the same unsafe and dangerous, and liable to cause personal injuries to persons passing over the same." The count then described the injury as it was described in the first count, and complains of the absence of a light as the negligence which caused the injury. Speaking of these counts, we, on the former appeal, said: "The injury and the negligence complained of as the cause are the same as set forth in both counts; and while it is averred that the construction of the steps and platform rendered them unsafe and dangerous, this does not constitute the negligence, alleged to be the cause of the injury; but, as we interpret the count, the allegations are intended to show a greater and more imperative duty to provide a light, from the failure to do which it is distinctly and expressly averred, in the new count, the injuries resulted. Under neither count is the plaintiff entitled to recover for any negligence other than the failure to provide a light."

When this case was returned to the circuit court, the defendant demurred to the counts of the complaint collectively, and

assigned as cause of demurrer, that "there was at the time mentioned in said complaint no statute of force in the state of Alabama which required of or imposed upon said defendant the duty to furnish good and safe platform and lights, or either of such platform or lights at Boligee station, nor was there any duty at the common law to furnish said platform or lights." There was, when the injury is alleged to have occurred,—February 11, 1885,—no statute relating to the subject in Alabama. Our first statute on that subject was approved February 28, 1887: Sess. Acts, 74. Was there a common-law duty resting on defendant at that time?

In *Montgomery etc. R'y Co. v. Thompson*, 77 Ala. 448, we said it was "the duty" of railroads "to provide safe waiting-rooms, and to keep the depot and platform well lighted in the night-time." The injury we were considering in that case occurred at the union depot in this city, Montgomery, the common passenger depot of five railroads, with trains arriving and departing at different times; and the plaintiff in that suit had just alighted from the train on which he arrived. In support of our views, we referred to the following authorities, which bear on the question of lighting the depot and its platform: 1 Thompson on Negligence, page 315, has this language: "It is the duty of the railway company to have its station-houses open and lighted, and its servants present, for the convenience of those who may wish to leave its trains, or to depart by the same." In support of this doctrine the author refers to *Patten v. C. & N. W. R'y Co.*, 32 Wis. 524. In that case the injury suffered was at a country depot, and the plaintiff, an elderly lady and unattended, was discharged from the train at 9:45 at night. The trial judge submitted it to the jury to determine whether the railroad was guilty of negligence in not having its depot lighted, or a person there to give information. The supreme court held there was no error in this. It will be observed that in the Wisconsin case there was at the depot neither a light nor a person to give information.

The case of *Knight v. P. S. & P. R. R. Co.*, 56 Me. 234, 96 Am. Dec. 449, also referred to by Thompson, arose as follows: Plaintiff was traveling under a ticket which secured her passage over two connecting railroads and a connecting steamboat line. From the terminus of the railroad, where plaintiff had to leave the cars, to the steamboat, was a "considerable distance," which she had to walk. It was across a wharf, the property of defendant, provided and used for the purpose.

Plaintiff, it being at night and dark, stepped into a hole in the planking, and was injured. The court said: "The wharf should be lighted. The servants of the defendant corporation should be in readiness to point out the way. The wharf should be safe."

Another case referred to in *Montgomery & E. R'y Co. v. Thompson*, *supra*, is *Stewart v. International & G. N. R. R. Co.*, 53 Tex. 289. The *gravamen* of the petition (plaintiff's complaint) was the negligent failure of the railroad company to provide "proper lights and accommodations for passengers at its depot." Held, that on general demurrer the petition was sufficient: See also *Peniston v. C. St. L. & N. O. R. R. Co.*, 34 La. Ann. 777; *Reynolds v. Texas Pacific R'y Co.*, 37 Id. 694.

The other cases cited do not refer to the question of lights.

The case of *People v. New York, Lake Erie, & W. R. R. Co.*, 104 N. Y. 58, 58 Am. Rep. 404, is relied on as showing there is no common-law duty resting on the railroad in the matter we have in hand. That was an application for the extraordinary writ of *mandamus*, to compel the railroad company to erect larger and more comfortable depot accommodations at Hamburg, one of its stopping-places. The relief was denied, the court holding that there was neither statutory nor common-law obligations resting on railroads to erect depot buildings. So, in this case, if the defendant railroad company had neglected or refused to erect any depot building, any waiting-room, or any platform at Boligee, we are not prepared to say there was any law under which it could have been compelled to do so.

The foregoing is not this case. The defendant did not neglect or refuse to erect a ticket-office, used as a waiting-room, with platform in front, and steps leading to it. All these were erected, and persons wishing to be carried on the railroad, or having other business with it, had a standing invitation to enter the office, and transact business thereat. Those desiring tickets must obtain them there, and not elsewhere. And this invited right of entry cannot, at least without special warning, be restricted to the simple privilege of entering and remaining long enough to procure a ticket. It would include the right authorized custom of using the office as a waiting-room if none other was provided. Hence, although there may have been no law requiring the railroad to erect an office and platform at Boligee, yet having done so, and having thereby invited persons having business with it to enter for its trans-

action, the law required that they should be adapted to the purpose, and not dangerous, hazardous, or unsafe,—this, under the enduring principles of the common law, which govern new exigencies that have arisen or may arise, equally with conditions that gave them form and expression centuries ago: *In re Railway Co. v. Railway Co.*, 87 Eng. Com. L. 410.

The expression in Thompson's case, *supra*, was used in reference to the case we were then considering. Thompson had just arrived and left the train at a common depot of five railroads, and in a city. The train having just arrived, and passengers in the act of leaving it, and this in the night-time, it is manifest that a light should have been furnished. And if the place was not otherwise sufficiently lighted, a light should have been provided at the place of debarkation. But this duty would have a limit. It would be incumbent only at the departure and arrival of trains, and for a sufficient time before departure, to enable persons desiring to take passage to be in readiness and enter the cars without undue haste; and after the arrival, to enable those leaving the train to do so in safety. Beyond this, the duty of the railroad to maintain a light at its depot would in no case extend: 1 Thompson on Negligence, 314; *Batton v. S. & N. R. R. Co.*, 77 Ala. 591; 54 Am. Rep. 80.

In the case we have in hand the complaint does not disclose the size of the place, Boligee, nor does it show for how many railroads it is a depot. It informs us of but the one. It is a rule of law, as it is a lesson of common experience, that precautionary requirements increase in the ratio that danger becomes more threatening. It is certainly true that less vigilance is demanded at a small country depot of a single road, visited but a few times in the twenty-four hours, than is required in cities where many trains arrive and depart during each day and night.

In each of the counts of the complaint it is averred that "the plaintiff attempted to descend the steps when the train was about arriving." About, in the connection here used, means nearly,—not far from; that is, near—not far from—the arrival of the train. Now, as these words are indefinite, and do not imply that the time had come when it was reasonably or apparently necessary that plaintiff should descend from the platform to place himself in readiness to enter the car without undue haste, it is doubtful, if the question were properly and singly raised, if it sufficiently avers the time had arrived when it had become the duty of the railroad

to have a light. The demurrer, however, does not point to this phase of the question, nor does it raise it singly. It takes the broad position that it was not the duty of the railroad to furnish "good and safe platform and lights, or either of them." We have shown above that if the road did furnish a platform, it must be good and safe, and that in certain conditions it was its duty to furnish a light. The demurrer does not sufficiently point out or specify any defect in the complaint, and it was rightly overruled.

The question of exemplary damages is raised in this case in two forms. It is first objected that such damages cannot be recovered unless specially claimed in the complaint. That is certainly the rule when special damages are awarded. And if the question were an open one, there is much in the argument that exemplary damages, to be recoverable, should be specially claimed. Simple negligence, with damage, authorizes compensatory damages; while to maintain a claim for exemplary or punitive damages, the negligence must be willful, wanton, or reckless. We have, however, settled the question otherwise, and we will follow our rulings: *Wilkinson v. Searcy*, 76 Ala. 176; 2 *Thompson on Negligence*, 1245; *Leach v. Bush*, 57 Ala. 145; *Panton v. Holland*, 17 Johns. 92; 8 Am. Dec. 369; *Louisville etc. R. R. Co. v. Jones*, 83 Ala. 376; *Taylor v. Holman*, 45 Mo. 371. In Texas the rule seems to be different: *Railway Co. v. Baker*, 57 Tex. 419; *Railroad Co. v. Gierse*, 51 Id. 189.

The following authorities declare the rule as to special damages: *Donnell v. Jones*, 13 Ala. 490; 48 Am. Dec. 59; *Hooper v. Armstrong*, 69 Ala. 343; *Pollock v. Gantt*, 69 Id. 373; 44 Am. Rep. 519; *Squier v. Gould*, 14 Wend. 159; *Baldwin v. Western R. R. Co.*, 4 Gray, 333; *Hart v. Evans*, 8 Pa. St. 13; *Good v. Mylin*, 8 Id. 51; *Lindley v. Dempsey*, 45 Ind. 246; *Chicago v. O'Brennan*, 65 Ill. 160; *Johnson v. Gorham*, 38 Conn. 513; *Adams v. Gardner*, 78 Ill. 568; *Wood v. Rice*, 24 Mich. 423.

The other phase of the question is presented on the evidence. It is contended for appellant that, taking the extremest view the testimony admits of, the conduct of the railroad company does not rise above simple negligence, as contradistinguished from gross negligence, which must be either willful, wanton, or reckless. Taking into the account the fact that the negligence complained of was the failure to furnish a light, there is no evidence in this record tending to prove

either willful, wanton, or reckless negligence on the part of the railroad: *Wilkinson v. Searcy*, *supra*; *Barbour County v. Horn*, 48 Ala. 576; *South and North Alabama R. R. Co. v. McLendon*, 63 Id. 266; *Lienkauff v. Morris*, 66 Id. 406; 1 *Sutherland on Damages*, 740; *Hamilton v. Third Avenue R. R. Co.*, 53 N. Y. 25; *Biles v. Holmes*, 11 Ired. 16; *Avera v. Sexton*, 13 Id. 247; *Seymour v. Chicago etc. R. R. Co.*, 3 Biss. 43. The circuit court erred in refusing to give charges 3 and 4.

When this case returned to the circuit court, the defendant interposed new pleas, and among them plea No. 6. That plea truly sets forth the size of the village of Boligee, the nature of the business done there, that it is what is commonly called a country station, is without a municipal government, and has neither gas, electric, nor other out-door lights. It then avers that the station-house and its attachments were amply sufficient and well appointed for the place, its travel and business, and were constructed with as much care as is required and observed at similar places by well-regulated railroads; that they had in-door lights at the station-house; and that it was not customary on well-regulated railroads to maintain out-door lights at such country stations. It further avers that their lights were portable, and subject to the call of the traveling public, and that "said plaintiff and the public generally were well acquainted with said station-house and the approaches thereto, and the habits and customs connected therewith for the regulation and use of said station, and for the use of the lights about the same; and defendant avers, this being its full duty in the premises, it provided such lights as were required by [of?] it at said station; and neither did the plaintiff, nor any one for him, demand any further or additional lights, nor ask to be lighted to or from the stopping-place of said train on said night." The plea is very full, and covers the whole ground it relies on as a defense to the action. That ground is, that it had conformed strictly to the usage and custom of well-regulated railroads at similar country stations in the construction of its station-house and the approaches to it, and in providing lights; and that the lights provided were sufficient, and at the service of plaintiff, if he had called for them. On this plea, as we understand the record, the plaintiff took issue. At all events, the record shows no demurrer to it. There was a demurrer to the complaint, and to plea No. 3, and these were ruled on. The record shows that issue was joined on the five pleas, and this

was the number left after the court, at a former term, had sustained the demurrer to plea No. 3.

If the testimony proved the truth of the material averments of fact contained in plea No. 6, under a well-settled rule of law, that would have entitled the defendant to a verdict, whether the plea was sufficient or not: *Irion v. Lewis*, 56 Ala. 190; *Mudge v. Treat*, 57 Id. 1; *Jones v. Collins*, 80 Id. 108.

Is the plea insufficient, if it had been demurred to? Railroad companies and other corporations are persons,—artificial persons, it is true,—but yet clothed with all the rights, as well as bound by all the obligations, which protect and govern natural persons. Their liabilities are the same, no greater, no less, than those which rest on natural persons in like conditions. A hotel-keeper, merchant, shop-keeper, or any other person engaged in business which invites patronage and personal calls, is under an obligation, corresponding to that of a railroad company, to provide for the safety of its visiting customers. If doing business, keeping open doors, and inviting and receiving customers in the night-time intensifies the diligence of the one, it equally intensifies the diligence of the other, the surroundings being similar. If there is a difference, it is only such difference as the number and frequency of invited calls may make; not a difference in kind, but in degree.

If railroad corporations, in the administration of their affairs, conform to the rules adopted, or in general use, by prudently conducted railroads, they are free from blame, unless they violate or disregard some positive requirement of the law, and thereby inflict an injury: *Louisville etc. R. R. Co. v. Allen*, 78 Ala. 494; *Ga. Pac. R. R. Co. v. Propst*, 83 Id. 518.

In the case of *Burke v. Witherbee*, 98 N. Y. 562, the plaintiff's intestate had been killed while working in a mine. A hook had become detached, and a car descended from above, causing the homicide. It was shown that in other mines as well as this this appliance was used, and that for over a year it had been in use in this mine night and day, without an accident. It was held that this was a full defense to the action. The court, Earle, J., in commenting on the facts of the case, said: "It seems to us quite inadmissible, if not preposterous, to attribute negligence to a mine-owner for using an implement which had been employed in different mines, and which under varying conditions, upon countless occasions, uniformly answered its purpose, without injury to any one." In *Laflin v. B. & S. W. R. R. Co.*, 106 N. Y. 136, 60 Am. Rep. 433,

it was said to be a general rule that "where an appliance, machine, or structure, not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe, and convenient, it may be continued without the imputation of negligence." That case is a strong authority bearing on the merits of the present suit. See also *Loftus v. Union Ferry Co.*, 84 N. Y. 455; 38 Am. Rep. 533.

What we have said above is at last but the corollary of the generally accepted definition of negligence, — "the want of such care as men of ordinary prudence would use under similar circumstances": Shearman and Redfield on Negligence, 12. See also *Cornman v. E. C. R'y Co.*, 4 Hurl. & N. 781. It would be monstrous to hold, that notwithstanding the railroad company did precisely and fully what men of ordinary prudence were in the regular habit of doing under similar circumstances, yet this defendant is liable for the injury the plaintiff suffered therefrom.

We cannot affirm that the circuit court erred in refusing to give charges 1 and 2, for the record does not show that in the construction and maintenance of the ticket-office, platform, its approaches and lights, the defendant railroad company conformed to what was customary at similar stations with well-regulated railroads.

Pleas Nos. 2 and 4 raise the defense of contributory negligence. There was testimony, not disputed, that the platform was only three and a half feet wide, that the steps were of equal width with the door, and immediately in front of it, and that plaintiff was familiar with the place. Going straight out from the door, the plaintiff could not have missed the steps, would not have fallen, would not have been injured. He testified himself that as he was crossing the platform he was cautioned to "look out for the steps." There is testimony that he crossed the platform obliquely to the right. But this needed no proof. The fact that he missed the steps and fell to the right of them is proof conclusive that he did deflect to the right. Was this not proximate contributory negligence? Was he not the author of his own injury? *O'Brien v. Tatum*, 84 Ala. 186; *Tanner v. L. & N. R. R. Co.*, 60 Id. 621; *Woodward Iron Co. v. Jones*, 80 Id. 123; *Lilly v. Fletcher*, 81 Id. 234; *Toomey v. L. B. & S. Coast R'y Co.*, 3 Scott N. R., 91 Eng. Com. L. 146; *Siner v. Great Western R'y Co.*, L. R. 3 Ex. 150; 1 Addison on Torts, sec. 34; *Wilds v. Hudson River R. R. Co.*, 24 N. Y. 430; *Hulbert v. N. Y. Central R. R. Co.*, 40 Id.

146; *Van Schaick v. Hudson River R. R. Co.*, 43 Id. 527; *City of Indianapolis v. Cook*, 99 Ind. 10; *Seymour v. C. B. & Q. R'y Co.*, 3 Biss. 43.

My own opinion is, that the plaintiff was guilty of proximate contributory negligence, and that on the testimony as deposed to by his witnesses the general charge ought to have been given in favor of the defendant. My brothers, however, think this was a question for the jury.

Reversed and remanded.

RAILROAD COMPANY IS BOUND TO KEEP ITS STATIONS and premises to which it invites the public in a reasonably safe and fit condition: See *McDonald v. Chicago etc. R. R. Co.*, 96 Am. Dec. 114; *Wabash etc. R'y Co. v. Locke*, 2 Am. St. Rep. 193, and note; and to keep them sufficiently lighted to guide passengers to and from trains: *Moses v. Louisville etc. R. R. Co.*, 4 Id. 231, and note 239.

EXEMPLARY DAMAGES ARE NOT RECOVERABLE in the absence of circumstances of aggravation beyond mere negligence: *Hart v. St. Louis etc. R'y*, 4 Am. St. Rep. 374, and note.

WHAT IS CONTRIBUTORY NEGLIGENCE IS A QUESTION FOR THE JURY, under proper instructions from the court, in cases where the facts are in dispute: *Wallace v. Western N. C. Co.*, 2 Am. St. Rep. 346, and note.

LYONS v. HAMNER.

[84 ALABAMA, 197.]

ESTATES OF DECEDENTS — JURISDICTION. — UPON APPLICATION BY ADMINISTRATOR FOR ORDER TO SELL LANDS OF DECEDENT, whether for the payment of debts or for distribution among heirs, the failure to name one or more of such heirs in the petition, or subsequent proceedings, is not the omission of a jurisdictional allegation, and does not affect the validity of the title acquired at such sale, so as to subject it to collateral attack. In such cases, the parties interested, whether parties to the record or not, may be made so by application to the court so as to sue out an appeal.

EJECTMENT under statute. The facts appear in the opinion.

E. G. Richards, for the appellant.

J. R. Dowdell, *contra*.

SOMERVILLE, J. The plaintiff, as one of the admitted heirs of Harrison Austin, deceased, shows herself to be entitled, *prima facie*, to a one-seventh undivided interest in the lands sued for in this action, which is one of ejectment under the statute.

The defendant sets up a title acquired by him under a sale made in November, 1885, by one Moore, as administrator of

Austin's estate, on application to sell the lands for division or distribution among the heirs of the estate. The petition was in every respect regular, and in due form, except that it failed to designate the plaintiff among those named as heirs of the decedent. It is contended by appellant's counsel that inasmuch as she was not named in the proceedings in the probate court as a party or distributee, she cannot be concluded by the sale made under that order of that court.

The precise point has many times been raised before this court, and has been adjudged against the view contended for by the appellant's counsel.

In *Duval's Heirs v. McLoskey*, 1 Ala. 708, decided in 1840, the administrator of Duval had filed his petition under the act of 1822, praying the county court to sell the lands in controversy for the payment of debts. The petition under which the sale took place properly described the lands and averred the jurisdictional grounds of sale as required by the statute, but it failed to conform to the statute in defectively omitting to mention the names of any of the heirs. The proceeding was held to be one "*in rem* against the estate of the intestate, and not *in personam*," and the omission of the names of the heirs was held to be an irregularity which would authorize a reversal on a direct appeal, but one that did not affect the jurisdiction of the court to make the sale, and could not be taken advantage of collaterally in an action of ejectment by the heirs for the land. The conclusion reached was based on the case of *Wyman v. Campbell*, 6 Port. 219, 31 Am. Dec. 677, where it was decided, in 1838, and again reiterated in 1840, in *Lightfoot v. Doe and Lewis*, 1 Ala. 475, and other cases, that proceedings in the orphans' court to sell realty were "*in rem* against the estate of the intestate, and not *in personam*," and that plenary jurisdiction was vested in the court over the thing,—in the nature of an admiralty proceeding,—although the owner or party in interest was not notified of the pendency of the proceeding; and that jurisdiction attached *quoad* the thing when the petition was regularly filed by a proper party, and was recognized by the action of the court, without notice to parties concerned; and that where jurisdiction had attached, the order of sale, although reversible for error on direct appeal, could not be assailed collaterally for such failure to give notice, which was an irregularity of the procedure merely in the exercise of such jurisdiction: *Lee v. Campbell*, 6 Port. 249; *Couch v. Campbell*, 6 Id. 262.

The same question arose again in *Duval's Heirs v. P. & M. Bank*, 10 Ala. 636, decided in 1846, and the principle was again announced that the decree of the county court, ordering a sale of the decedent's realty, under the act of 1822, could not be collaterally impeached by showing that there was an entire failure to designate the heirs by name in the petition, or elsewhere in the record,—this not being a jurisdictional allegation, and that such omission did not render such sale void. In each of the foregoing cases the parties assailing the validity of the sales were the heirs themselves, whose names had been omitted from the petition of the administrator, and other subsequent proceedings, they being in the first case plaintiffs in an action of ejectment, as in the present action, and in the second parties complainant to a bill in equity instituted against the purchaser. The sale was held to be as binding against them on collateral attack as if they had been made parties, and served with regular notice of the pendency of the proceeding.

In *Field's Heirs v. Goldsby*, 28 Ala. 218, decided in 1856, the doctrine of these cases was again reviewed. The objection there urged to the petition of the administrator, which was filed praying a division among heirs, was, that it failed to set forth the heirs who were of full age, which it was insisted was a jurisdictional allegation, inasmuch as it was expressly required by the statute. The principle to which we have above adverted, as settled in *Duval v. McLoskey*, 1 Ala. 708, and *Duval v. P. & M. Bank*, 10 Id. 636, was reiterated by Goldthwaite, C. J., and adhered to by the court, with the following observation: "Could we regard the question as an open one, we might arrive at a different conclusion from that which was attained in *Duval v. McLoskey*, *supra*, but after it has been recognized by a subsequent decision, and has probably been acted upon as a practicable rule of property, we do not feel at liberty to depart from it."

That was about sixteen years after the first announcement of the principle by the court in 1840. Since then more than thirty additional years have elapsed,—making in all forty-seven years since the case of *Duval v. McLoskey*, *supra*, was decided.

In *Mathewson's Heirs v. Hearin*, 29 Ala. 210 (1856), this court, speaking through Rice, C. J., in discussing *Wyman v. Campbell*, *supra*, and the case above cited, declared the presumption to be a fair one that "the opinions delivered in those

cases had been acted upon as a rule of property," and therefore that "the reasons which impel courts to uphold every settled rule of property require us to reaffirm and maintain those cases, not only as to the points necessarily involved, but as to the principles which are declared in *Lightfoot v. Lewis*, and the subsequent cases above cited, to have been established by them."

The case of *King v. Kent's Heirs*, 29 Ala. 542, was decided the following year, 1857, and upon the strength of the foregoing authorities it was said: "In determining upon the validity of the decree of the orphans' court, when collaterally assailed, it is only necessary to inquire whether the court had jurisdiction of the subject-matter; for the proceeding is *in rem*, and no mere irregularity can render it void."

These cases again came under judicial review in *Satcher v. Satcher*, 41 Ala. 26, 91 Am. Dec. 498, decided in 1867, where the following language was used by Walker, C. J.: "The proceeding in the probate court for the sale of the decedent's land is held, by a long chain of decisions, not now to be questioned, to be *in rem*; and therefore the validity of the order can never depend upon the fact that the court has acquired jurisdiction of the person of the parties. The requisition of notice is just as plainly and as positively made in the act of 1822 as under any subsequent law: Clay's Digest, p. 224, sec. 17. Under the act of 1822, the order of sale was not void on account of the want of notice. It was so settled by the decisions of this court. We cannot," he added, "decide to the contrary, unless we disregard the doctrine of *stare decisis*, and overturn decisions which constitute a rule of property, under which millions of dollars' worth of land are probably held. No person who will examine the act of 1822 can say that there is a reason for regarding the proceeding to sell land under the present law as *in personam* which did not apply to the old law, under which, as every intelligent lawyer knows, the proceeding was regarded as *in rem*." In discussing elsewhere in the same case, and declining to assent to, the proposition that the sale is made void by a failure to comply with every statutory requirement, it is suggested that such a rule would lead to consequences alike absurd and injurious. Among these is enumerated "an inaccuracy in the list or description of the heirs, or their residences," as one of the omissions, which, under the operation of the rule, would render the sale void. "One desiring to purchase at the sale," it was observed, "would be

unable to ascertain, by an examination of the records and papers, whether the title would be valid. After making the most careful inquiry, and finding no defect in the proceedings, and therefore venturing on a purchase, his title (if such were the law) might be defeated by evidence that there was some heir whose name was overlooked, or forgotten by the administrator, or not known by him, and therefore not inserted in his petition." The inevitable effect of holding that omissions of this kind would render the sale in any respect invalid, it was thought by the court "would be to destroy confidence in such sales, and cause great injury to heirs by sales at greatly depreciated prices."

There has been no departure from the principles of these cases at any time during the past fifty years; but on the contrary, they have been constantly reaffirmed: 3 Brickell's Digest, 465, secs. 162 et seq. In *McCorkle v. Rhea*, 75 Ala. 213, decided as late as 1883, while declining to extend the rule announced in *Duval v. McLoskey*, *supra*, to proceedings for the partition or division of property owned by tenants in common, we observed as follows: "Perhaps these cases [citing *Whitman v. Reese*, 59 Ala. 532, and *Johnson v. Ray*, 67 Id. 603] are not in strict analogy to the line of decisions, so long prevailing in this state, in which it is held that, upon application by an administrator to sell the lands of a decedent, the failure of the petition to state the names of the heirs, although expressly required to be done by the statute, is not the omission of a jurisdictional averment which would render the sale void, but a mere irregularity rendering the judgment reversible on error: *Duval v. McLoskey*, 1 Ala. 708; *Matheson v. Hearin*, 29 Id. 210. This principle has become a rule of property in this state, in this particular class of cases, and under its influence, no doubt, many titles have been acquired. However unsound we might be disposed to regard it, we do not feel at liberty to depart from it at this time."

We regard it, therefore, we repeat, as established by a long line of decisions in Alabama, extending through half a century, that, on an application by an administrator to the probate court to sell the lands of a decedent, whether for the payment of debts or for distribution among heirs, the failure to name one or more of such heirs in the petition, or subsequent proceedings, is not the omission of a jurisdictional allegation, and does not affect the validity of the title acquired at such sale, so as to subject it to collateral attack; and if the

court has jurisdiction of the thing sold, although it has acquired none over the person of the parties owning it, the sale is binding on the world, including the heirs whose names are omitted from the petition and the proceedings. In such cases, the parties interested, whether parties to the record or not, may be made so by application to the court, so as to sue out an appeal: *McConico v. Cannon*, 25 Ala. 462; *Lightfoot v. Doe and Lewis*, 1 Id. 475, 479; *Clemens v. Patterson*, 38 Id. 721; 1 Brickell's Digest, 92, sec. 129. And with this ready mode of redress open to all whose rights may be prejudiced, it cannot be said that any person has been deprived of his property, in cases of this peculiar kind, without due process of law, or that he has been deprived of his day in court: *Dickey v. Vann*, 81 Ala. 425; *Clemens v. Patterson*, 38 Id. 721, *supra*.

The circuit court did not err in giving the general affirmative charge in favor of the defendant, or in refusing to give the charge requested by the plaintiff, and the judgment must be affirmed.

PROCEEDING IN PROBATE FOR SALE OF DECEDENT'S REALTY IS IN REM, and cannot be collaterally attacked: *Satcher v. Satcher*, 91 Am. Dec. 498; but see *Clark v. Thompson*, 95 Id. 457, and note, where it is held that if all the steps to bring the parties before the court upon such a position have not been properly taken the court acquires no jurisdiction to decree the sale.

OMISSION TO STATE NAMES OF HEIRS IN PETITION FOR SALE OF DECEDENT'S REALTY is mere irregularity, which cannot be taken advantage of collaterally to defeat the sale: *Morris v. Hogle*, 87 Am. Dec. 243, and note.

WILLIAMS v. GIBSON.

[84 ALABAMA, 228.]

MINES AND MINERAL LANDS. — MINERALS UNSEVERED FROM SOIL, OR "IN PLACE," ARE PARTS OF FREEHOLD, and constitute landed property capable of a possession distinct from that of the surface, and may form a separate corporeal hereditament, which is the subject of a distinct inheritance.

ID. — IT IS ONLY WHEN MINERALS ARE SEVERED FROM SOIL THAT THEY BECOME PERSONAL CHATTELS, and it is only where the right to dig or to mine them is not exclusive that it may be classed as an incorporeal right, or easement merely in the nature of a license.

ID. — EXPRESS GRANT OF ALL MINERALS OR MINERAL RIGHTS IN TRACT OF LAND is, by necessary implication, the grant also to open and work the mines, and occupy so much of the surface as may be reasonably necessary for such purpose. And this implied right to occupy so much of the surface as may be needed to open and work the mines is not limited, but rather strengthened, by the special grant of certain timber and water privileges, and of the right of way to and from the mines.

ID. — OWNER OF MINERALS AND MINING RIGHTS MUST USE HIS OWN so as not unreasonably to injure his neighbor, the owner of the surface or soil; and must so conduct his mining operations as to leave a sufficient support for the surface. What improvements are reasonably necessary for the profitable and beneficial working of the mines, and the inquiry as to how much of the surface may be reasonably needed for this purpose, are questions of fact to be determined by the jury.

ID. — OWNER OF MINING RIGHTS CANNOT USE SURFACE OR MATERIALS of the land for changing the character of the mineral to which he is entitled, as for converting coal into coke; and in ejectment for the surface of the land, evidence as to how much of the surface was or might be needed for the erection of coke-ovens is properly excluded.

ID. — EJECTMENT FOR SURFACE OF MINERAL LAND — EVIDENCE. — Where, in an action in the nature of ejectment for the surface of land used in working a mine, it appeared that the defendant had established a supply store, it is not error to admit evidence showing that two other stores were located near the mines, for the purpose of testing the urgency of the alleged necessity impelling the defendant to occupy the land for such purpose; and evidence of the value of improvements made by the defendant around the mines is relevant as affecting the rental value of the land sued for. But it is not competent to show, in such action, that particular individuals in the neighborhood carried on a mine without a storehouse for supplies, the business of mining in the vicinity being of a date too recent to establish a custom.

STATUTE OF FRAUDS. — VERBAL CONTRACT FOR PURCHASE OF LAND, NEVER REDUCED TO WRITING, nor accompanied by a payment of any part of the purchase-money, is void under the statute of frauds, and confers no rights prejudicial to either party to an ejectment suit for the land.

ACTION in the nature of ejectment under the statute. The material facts appear in the opinion.

McGuire and Collier, and Webb and Tillman, for the appellant.

Hewitt, Walker, and Porter, contra.

SOMERVILLE, J. The present suit, which is one of ejectment under the statute, involves a controversy between the superjacent and subjacent owners of land, upon which there is a coal mine, opened and in process of being worked by the defendant. The plaintiff, Gibson, is the owner of the surface, and the defendant, Williams, of the "coal and other minerals," with certain incidental and other rights, derived through various mesne conveyances from one Green B. Frost, the original owner in fee-simple of the premises. In November, 1881, Frost conveyed to one Peters "all the coal and other minerals in, under, and upon" these lands, which are fully described in the deed; "and also all timber and water upon the same necessary for the development, working, and mining of said

coal and other minerals, and the preparation of the same for market, and the removal of the same; and also the right of way, and the right to build roads of any description over the same necessary for the convenient transportation of said coal and other minerals from said land, and the conveying and transporting to and from said lands all materials and implements that may be of use in the mining and removal of said coal and other minerals, or in the preparation of the same for market." Subsequently, in August, 1884, Frost conveyed the same lands to one C. L. Frost and J. B. Reeves, reserving, by exception from the lands sold, the mineral rights and other interest previously conveyed to Peters, using the same language of description adopted in the deed to him. The defendant is shown to have acquired by deed, through sundry mesne conveyances, the precise interest which Peters owned.

This interest may be briefly described under three general heads: 1. A grant of all the coal and other minerals upon or in the land; 2. So much of the timber and water on the land as may be necessary (*a*) for the development, working, and mining of the coal and other minerals, and (*b*) for the preparation of the same for the market, and their removal from the soil and the premises; 3. The right of way, by roads of any description, to and from the lands, so far as may be necessary for the transportation of all minerals mined, and of materials and implements needed in the business of mining and the preparation of the minerals for market.

The material question is, what, if any, surface rights pass to the grantee under the first head, which is a grant of all the coal and other minerals upon and in the land.

This is dependent in some measure upon the nature and characteristics of the thing granted. Minerals which are unsevered from the soil, or, as sometimes said, which are "in place," are parts of the freehold, and constitute landed property. They are capable of a possession distinct from that of the surface, and may form a separate corporeal hereditament, which is the subject of a distinct inheritance. The title of the soil, as such, including the surface, may be vested in one person, and that of the mines and minerals on it in another. It is only when the minerals are severed from the soil that they become personal chattels, and it is only where the right to dig or to mine them is not exclusive that it may be classed as an incorporeal right, or easement merely in the nature of a license: *Bainbridge on Mines and Mining*, Am. ed., 3, 261;

Massot v. Moses, 3 S. C. 168; 16 Am. Rep. 697; *Caldwell v. Fulton*, 31 Pa. St. 475; *Melton v. Lambard*, 51 Cal. 258; *Rycman v. Gillis*, 57 N. Y. 68; 15 Am. Rep. 464.

The express grant of all the minerals or mineral rights in a tract of land is, by necessary implication, the grant also to work them, unless the language of the grant itself repels this construction. This is the result of the familiar maxim, that "when anything is granted, all the means of obtaining it, and all the fruits and effects of it, are also granted": *Sheppard's Touchstone*, 89; 11 Coke, 52 a. This involves the incidental right to penetrate the surface of the soil for the minerals, and to use such means and processes for the purpose of mining and removing them as may be reasonably necessary, in the light of modern inventions, and of the improvements in the arts and sciences, but without injury to the right of support for the surface, or superincumbent soil, in its natural state: *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; 14 Am. Rep. 322; *Wilms v. Jess*, 94 Ill. 464; 34 Am. Rep. 242; *Bainbridge on Mines and Mining*, 35, 62, 63. It is said by a standard English author touching this subject: "The right to work mines is so inseparable from the grant of them that it has been expressly decided, not only that the right to enter and work mines is necessarily incident to the grant of mines, without any express authority for that purpose, but that this power cannot be restrained by a special power given in the affirmative, which would authorize more acts than would be implied by law, but which will in no wise exclude the full operation of the law": *Bainbridge on Mines and Mining*, Am. ed., 34, 35.

It is contended that this incidental right to work the mines on the land is limited by the special grant of certain timber and water privileges, and of the right of way to and from the mines, and that the mention of these privileges, under the maxim, *Expressio unius est exclusio alterius*, would rebut the grant of any right to occupy the surface of the soil for miners' houses, or other like purposes. It is often said that great caution is frequently necessary in the application of this maxim, and of its twin legal aphorism of synonymous meaning, *Expressum facit cessare tacitum*: *Broom's Legal Maxims*, 506. It is obvious that without the right of surface occupation to some extent, the grant in question is rendered nugatory. The principle is well settled that one who has the exclusive right to mine coal upon a tract of land has the right of possession even as against the owner of the soil, so far as is reasonably neces-

sary to carry on his mining operations: *Turner v. Reynolds*, 23 Pa. St. 199; *Rogers v. Taylor*, 38 Eng. L. & Eq. 574; *Tennessee etc. R. R. Co. v. East Alabama R. R. Co.*, 75 Ala. 524, 525; 51 Am. Rep. 475. To construe away this right would be to construe away the grant itself, which cannot be enjoyed without it. It is our opinion that the enumeration of these special privileges was not intended to exclude another which was absolutely necessary to the very life of the grant itself. The right to use timber would not pass by implication: Bainbridge on Mines and Mining, 64. This was, therefore, the acquisition of a new and valuable right. The right of way and water privileges were also more comprehensive possibly than would have been yielded pacifically by mere construction. At any rate, these several grants themselves necessarily imply the right to occupy so much of the surface as might be needed to open and work the mines. There could be no use of timber, or water, or right of way, except in connection with working the mines, and there could be no working of the mines without an occupation of the surface in the vicinity of the shafts, slopes, or other requisite openings. These specifications strengthen rather than repel the implication in question: *Marvin v. Brewster Iron Mining Co.*, 14 Am. Rep. 329; Bainbridge on Mines and Mining, 34, 35.

The owner of the minerals and mining rights must use his own so as not unreasonably to injure his neighbor, the owner of the surface or soil; and it is, we repeat, now settled by the authorities quite universally, that he must conduct his mining operations so as to leave a sufficient support for the surface: *Carlin v. Chappel*, 101 Pa. St. 348; 47 Am. Rep. 722, and cases cited; *Harris v. Ryding*, 5 Mees. & W. 69; *Rogers on Mining*, 455. In other words, the exclusive grantee of minerals in lands is entitled to dig and carry away so much of them as he can excavate from the soil without injury to the surface owned by the grantor, the mining right being servient to the surface to the extent of sufficient supports to sustain it in its natural state: *Jones v. Wagner*, 5 Am. Rep. 385. But he is not liable for any incidental damages necessarily occasioned by the ordinary and careful operation of his mines, not injurious to the surface, as, for example, the loss of springs by the owner of the soil: *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93; or the disturbance of the peace and comfort of the surface owner's dwelling by necessary blasting in the mines: *Marvin v. Brewster Iron Mining Co.*, 14 Id. 322.

These incidental rights of the miner, which are appurtenant to the grant of the mineral rights, are to be gauged by the necessities of the particular case, and therefore vary with changed conditions and circumstances. He may occupy so much of the surface, adopt such machinery and modes of mining, and establish such auxiliary appliances and instrumentalities as are ordinarily used in such business, and may be reasonably necessary for the profitable and beneficial enjoyment of his property. But he is not limited, as we have already said, to such appliances as were in existence when the grant was made, but may keep pace with the progress of society and of modern invention: Bainbridge on Mines and Mining, 63, 64; *Marvin v. Brewster Iron Mining Co.*, 14 Am. Rep. 322. It has been accordingly held in England that a reservation of mines of coal (which is usually the same in legal effect as a grant), with rights of way for transportation, involved the right to construct a modern railway, although this mode of transportation was unknown at the time of the grant. The ground of the decision seems to have been, that without use of the railway for shipment the mines could not, under the evidence, have been worked beneficially, or with reasonable profit.

We do not construe the language of the present grant or reservation as it appears in the deeds of the plaintiff and those under whom he claims to confer any right, by implication or otherwise, to use the surface of the land for the purpose of erecting coke-ovens, designed for the conversion of coal into coke. His only right is to mine and transport coal in its first marketable state. The contract clearly contemplated nothing else. Such is the usual construction placed upon similar grants, the principle being thus stated by Bainbridge in his treatise on mines and mining, page 63: "An owner of that kind cannot use the surface, or any of the materials of the land, for changing the character of the mineral to which he is entitled, as for converting coal into coke, clay into bricks, or for smelting the metallic ores, much less for any further purpose of manufacture."

The evidence shows that the defendant claimed the right to occupy as much as three acres of the surface of plaintiff's land as incident to his grant. Upon this area he had erected five two-story framed miners' houses, four log cabins for the occupancy of employees, an air-shaft for conveying smoke from and ventilating the mines, a powder-house for keeping powder

used for blasting, a blacksmith-shop, and a storehouse for furnishing the miners with supplies. Which of these improvements are reasonably necessary for the profitable and beneficial working of the mines, is a question of fact to be determined from the evidence by the jury. And so likewise the inquiry as to how much of the surface of the land may be reasonably needed for this purpose. It may be that other suitable lands, conveniently situated, could be obtained at a reasonable price for the site of the miners' houses, the cabins, and the store; or the contrary may be true. It may be that the mine was so far distant from the market for supplies, and that prices in neighboring stores were so extravagant, as to render necessary the establishment of a supply store, both for the economy of time and money of the employees. It may be that such a store was a mere convenience, and not a necessity, within the meaning of the law, for this necessity cannot be deemed to exist if a similar privilege can be otherwise secured by reasonable trouble and expense: Note to *O'Rorke v. Smith*, 23 Am. Rep. 446; Tiedeman on Real Property, secs. 606, 609. These and other like considerations it would be proper for the jury to consider in solving the question of necessity,—a word of relative import, which may mean, on the one hand, less than imperative need, and on the other, more than mere suitable convenience.

It is manifest that the rulings of the circuit court are not in harmony with these views, including both the instructions to the jury and the rulings on the evidence.

The defendant should have been permitted to show to what extent his occupancy of the surface of the lands, around the opening of the mine, was reasonably necessary, under the above rules, to the prosecution of the mining business.

The evidence as to how much of the surface was or might be needed for the erection of coke-ovens was properly excluded.

It was not competent to show that particular individuals in the neighborhood carried on a mine without a storehouse for supplies, although a usage in the matter by other miners similarly situated might be relevant if it had prevailed sufficiently long, and possessed the other requisite characteristics of an established custom. But the business of mining in this particular part of the state is probably of a date too recent at this time to give such a custom the age necessary to its validity.

The court did not err in allowing evidence to be introduced showing that two other stores were located near the mines. It was quite as relevant to show that there were two stores near by as that there were a hundred, with a view of testing the urgency of the alleged necessity impelling the defendant to establish one for his own needs. The two cases differ only in degree, not in kind.

The value of the improvements erected by the defendant around the mines was relevant as affecting the rental value of the three acres of land sued for,—the defendant being liable for rent by way of use and occupation in the event of plaintiff's recovery.

The verbal contract of purchase, which the witness Smith testifies he made, of part of the surface in controversy from Frost and Reeves, who sold to the plaintiff, was never reduced to writing, nor accompanied by a payment of any part of the purchase-money. It was therefore void under the statute of frauds, and could confer no rights on the alleged purchaser which would prejudice those of either party to the present suit.

The judgment is reversed, and the cause remanded.

RIGHT TO MINE, AND OWNERSHIP OF MINES AND MINERALS: See the extended note to *McClintock v. Bryden*, 63 Am. Dec. 92 et seq.; and see *Reynolds v. Cook*, ante, p. 317.

PART PERFORMANCE OF PAROL AGREEMENT FOR SALE OF LANDS which will take case out of statute of frauds: See *Poland v. O'Connor*, 93 Am. Dec. 327, and note.

BOUTWELL v. STEINER.

[84 ALABAMA, 807.]

MORTGAGES—PARTY TO FORECLOSURE SUIT.—MORTGAGOR HAVING SOLD AND CONVEYED his entire interest in the land, being a mere equity of redemption, is not a necessary party to a suit brought to foreclose the mortgage lien. His assignee only need be made a party defendant.

Id.—FORECLOSURE SUIT—LIMITATION.—PURCHASER FROM MORTGAGOR IS CHARGED WITH NOTICE of lien created by mortgage duly recorded; and a suit to foreclose the mortgage is not barred, as in his favor, short of a period of ten years from the commencement of his possession under the purchase.

Id.—DECREE NOT AFFECTING MORTGAGEE.—MORTGAGEE OF HUSBAND NOT MADE PARTY to a bill filed by the wife against her husband, setting up a resulting trust in the mortgaged lands, is in no manner prejudiced by the decree rendered therein in favor of the wife.

- ID. — PURCHASE OF PROPERTY BY MORTGAGEE AT HIS OWN SALE, WHEN ALLOWED TO STAND.** — If a mortgagee buys personal property at his own sale, under a power in the mortgage, and the mortgagor interposes no objection showing his disapproval of the purchase, and asking to disaffirm the sale, a subsequent purchaser from him cannot do so in a suit brought nine years afterwards to foreclose the mortgage on land.
- ID. — FORECLOSURE EXPENSES — STIPULATION IN MORTGAGE, WHEREBY MORTGAGOR BINDS HIMSELF TO PAY ALL COSTS** of recording the mortgage, and the costs and expenses attending the enforcement of the collection of the mortgage debt, is binding on his assignee or purchaser from him, and fastens a lien on the land for these reasonable expenses.

BILL filed by Steiner, mortgagee, against Boutwell and wife, to foreclose a mortgage on lands, executed by one Hinson January 9, 1873, and duly recorded. In June, 1873, the wife of Hinson filed her bill against him, setting up that the mortgaged land was purchased with her money; and in October, 1873, it was decreed that the title to said land be divested out of Hinson, and vest in her. To this bill Steiner was not a party. Mrs. Hinson and her husband went into possession of and lived on the land, and in January, 1877, conveyed it to Boutwell and wife. Other facts appear in the opinion.

Gamble and Richardson, for the appellant.

R. E. Steiner, contra.

SOMERVILLE, J. 1. The mortgagor, Hinson, having unconditionally sold and conveyed to the appellant, Boutwell, his entire interest in the land, being a mere equity of redemption, he was not a necessary party to the present suit, the purpose of which is to foreclose the mortgage lien. His assignee only need be made a party defendant: *Batre v. Auze*, 5 Ala. 173; *Wilkinson v. May*, 69 Id. 33; *Barbour on Parties*, 463; *Story's Eq. Pl.*, sec. 197.

2. The mortgage having been recorded in the proper county before Boutwell purchased the land, he was charged with a knowledge of the lien created by it. His possession under the purchase could not mature into a good title, under the operation of the statute of limitations, short of ten years: *Smith v. Gillam*, 80 Ala. 296; *State v. Conner*, 69 Id. 212. This period of time did not elapse between the possession taken under the sale and the filing of the present bill.

3. The appellee, never having been made a party to the bill filed by Mrs. Hinson against her husband, by which she set up a resulting trust in the mortgaged lands, is in no manner

prejudiced by the decree rendered in that case: *Owen v. Bankhead*, 76 Ala. 143.

The demurrer to the original bill, raising these points, was properly overruled, even admitting the appellant's right to assign errors on the decree rendered August 30, 1886. That decree, we are inclined to think, however, is final; and the present appeal not having been taken until September 24, 1887, more than a year from that date, and being confined by the condition of the appeal bond to the decree rendered July 7, 1887, on exceptions taken to the register's report, the appellant could not assign errors on the first decree, and the motion to strike out these assignments could properly be sustained. But we can well rest this opinion on the ground that the first decree is entirely free from error.

4. Nor do we discover any error in the last decree confirming the register's report. The amount allowed by the register for the mules sold under the mortgage was the price bid for them at the sale. It is true, they were purchased by the mortgagee at his own sale, but nine years had since elapsed up to the present suit, and no objection had been interposed by the mortgagor showing his disapproval of the purchase, and asking to disaffirm the sale. His only mode of doing this was by filing a bill and proposing to do equity by paying the mortgage debt: *Ezzell v. Watson*, 83 Ala. 120; *Garland v. Watson*, 74 Id. 323. The appellant certainly cannot exercise this option for him.

5. The mortgagor had bound himself to pay all costs of recording the mortgage, and the costs and expenses attending the enforcement of the collection of the mortgage debt. This stipulation was as much binding on his assignee, the appellant, as the mortgage debtor himself, and fastened a lien on the land for these reasonable expenses. We do not see that the several amounts allowed by the chancellor, under this head, are at all unreasonable, and his decree must be affirmed.

IF MORTGAGOR HAS DISPOSED OF HIS INTEREST, his grantee only need be made party to foreclosure proceedings: *Goodenow v. Ewer*, 76 Am. Dec. 540.

NANCE v. NANCE.

[84 ALABAMA, 875.]

HUSBAND AND WIFE. — ANTENUPTIAL SETTLEMENT BY WHICH HUSBAND CONVEYS land to the wife, in consideration of the marriage, is not fraudulent and void as to his creditors, although he was at the time insolvent, or may have intended fraud, if the wife had no notice of his fraudulent intent, and did not participate in any such purpose on his part.

ID. — VALUE OF PERSONAL SKILL AND LABOR EXPENDED BY HUSBAND, in the improvement of his wife's estate, cannot be reached by a court of equity, and appropriated to the satisfaction of creditors' claims against the husband.

ID. — MATERIALS FURNISHED BY HUSBAND WITH HIS OWN MONEY, AND USED IN IMPROVING HIS WIFE'S PROPERTY, if he is embarrassed, will be regarded as a gift in fraud of his creditors, who may make the wife's estate liable therefor. But her estate will not be charged, if the whole amount so expended by him, with his other personal property, is of less value than the amount exempted from execution in his hands.

FRAUDULENT CONVEYANCES. — CREDITOR CANNOT IMPEACH AS FRAUDULENT a sale or voluntary disposition of property which by statute is exempt from the payment of debts.

ID. — FRAUD CANNOT BE INFERRED FROM MERE FACT that two conveyances were executed when one would have answered.

John T. Heflin, for the appellants.

Bishop and Whitson, and Watts and Son, contra.

CLOPTON, J. The defendants were married in February, 1867. Prior to the solemnization of the marriage, an agreement was entered into between them, by which W. H. Nance agreed, in consideration of the marriage, to settle on the intended wife, by good and sufficient conveyances, to be executed on or before the first day of January thereafter, certain specified real estate situated in the town of Talladega. The conveyances were executed as provided by the agreement. Appellants, who are judgment creditors of Nance, and who were creditors at the time of the execution of the agreement and of the marriage, seek by the bill to condemn the real estate to the satisfaction of their judgments, on the ground that the agreement and conveyances are fraudulent as to his creditors.

Though fraud may be intended by the husband, an antenuptial settlement is not void as to his creditors, if the wife has no notice of his fraudulent intent; both must concur, or the wife's right will not be affected thereby. In *Prewitt v. Wilson*, 103 U. S. 22, the husband was the owner of a large amount of property, consisting chiefly of lands, which he

conveyed to his wife in consideration of marriage. He was insolvent, his property being worth about fifty thousand dollars, and his debts exceeding seventy thousand dollars. Though the wife knew that he was embarrassed and in debt, there was no evidence that she was aware of the amount of his property, or the extent of his debts, or that he had any purpose except to induce her to consent to the marriage. It is said: "There is an entire absence of elements, which vitiate even an ordinary transaction of sale where, if set aside, the parties may be placed in their former positions. And an antenuptial settlement, though made with a fraudulent design by the settler, should not be annulled without the clearest proof of the wife's participation in the intended fraud, for upon its annulment there can follow no dissolution of the marriage, which was the consideration of the settlement." It may be that at the time of the agreement Nance was in fact insolvent, but if so there is no evidence tending to show that he himself was aware of it at that time. It was subsequently revealed by the development of the condition of the mercantile business in which he was engaged. The wife was not informed, and had no reason to believe or suspect, so far as appears from the evidence, that he was in debt. Both parties testify, and there is nothing which casts a doubt on the truthfulness of their statements, that no fraud was intended, and the sole consideration of the agreement was the marriage as expressed therein, —the wife requiring a settlement to be made on her as a wise and prudent provision against future misfortune or adversity. The evidence wholly fails to show that she was prompted by a fraudulent intent, or that she participated in any such purpose on the part of her husband.

Two conveyances were made by Nance to his wife at different times, but both within the time required by the agreement, distinct lots being embraced in each conveyance, and both conveying only the two lots expressly designated and stipulated. Counsel contend that the first conveyance should be regarded as having been made and accepted in full satisfaction of the agreement, leaving the second conveyance purely postnuptial. This position is untenable. Fraud cannot be inferred from the mere fact that two conveyances were executed when one would have answered. Marriage is a valuable consideration, and often regarded as of the highest degree of value. The husband was under a moral and legal obligation to fully perform the contract, upon the faith of which the wife entered

into the marital relation. Had he, after making the first conveyance, refused to convey the other lot specified in the agreement, a court of equity would have enforced its specific performance by compelling the execution of a conveyance to such other lot, and will sustain, when voluntarily done, what would have been compelled: *Lockwood v. Nelson*, 16 Ala. 294.

The evidence shows that the husband expended his skill and labor in making valuable erections and improvements on the lots after the marriage; and it is insisted that complainants have a right to condemn to their demands the value of the labor. The bestowment of the labor in improving the separate estate of the wife did not constitute her a debtor to the husband, nor can her separate estate be charged therewith in favor of the husband's creditors. As personal labor is not the subject of compulsory sale for the payment of debts, and as a decree *in personam* cannot, in such case, be rendered against the wife, a court of equity is powerless to appropriate the value of the labor to such purpose. In *Hoot v. Sorrell*, 11 Ala. 386, where this question was considered and decided, it is said: "The labor was not susceptible of seizure, and the auxiliary jurisdiction of equity cannot operate upon it. When the husband merely expends his personal labor in the improvement of his wife's estate, the estate is not thereby made a debtor to the husband, nor can the creditors charge it with the value of the labor."

Materials furnished in making erections or improvements on the wife's separate real estate by the husband with his own money, if he is embarrassed, will be regarded a gift in fraud of his creditors, who may make her estate liable therefor. But her estate will not be charged unless the bill alleges, and the proof shows, that the materials furnished by the husband were in his hands subject to their claims. If the husband's power of disposition is not restricted as to the creditors, they cannot complain, as no wrong is done to them. A creditor cannot impeach as fraudulent a sale or voluntary disposition of property which, by statute, is exempt from the payment of debts. In a conveyance or other disposition of such property, he has no interest, and is not thereby delayed, hindered, or defrauded, as he could not have subjected the property if retained by the debtor. At the time the materials were furnished by the husband, personal property to the amount of one thousand dollars was exempt. The duty to select what particular property he will retain as exempt is devolved on

the debtor, when he owns personal property exceeding in value the amount exempted, and such selection must be made before there is a sale under legal process. But if he has not property exceeding in value the amount exempted, a selection is not required; in such case, the statute "attaches the exemption as absolutely and unconditionally as if the particular property was specially designated and declared exempt": *Alley v. Daniel*, 75 Ala. 403; *Fellows v. Lewis*, 65 Id. 343; 39 Am. Rep. 1. The averments of the bill may be sufficient, but the whole tendency of the evidence is, that at the various times when the materials were furnished, and the engine and other machinery were paid for, partly with the money of the husband, all his personal property, including the money so used, was of less value than one thousand dollars.

Affirmed.

VALIDITY OF MARRIAGE SETTLEMENT AS AGAINST HUSBAND'S CREDITORS: See the note to *Merritt v. Scott*, 50 Am. Dec. 371-375; and *Houghton v. Houghton*, 77 Id. 69, and note.

HUSBAND, BY IMPROVING WIFE'S LAND without any agreement with her that his labor and money should vest any interest in him, acquires no title or interest which his creditors can reach by aid of a court of equity: *Webster v. Hildreth*, 78 Am. Dec. 632; *Fuller v. Alden*, 99 Id. 173, and notes.

McQUIRK v. STATE.

[84 ALABAMA, 435.]

CRIMINAL LAW. — ESSENTIAL CONSTITUENT OF CRIME OF RAPE is, that the act should be intended to be done with force, actual or constructive, and without the woman's consent, express or implied. If she was at the time unconscious, or in a state of stupefaction, the idea of force is necessarily involved in the wrongful act itself, — the act of penetration. If she is idiotic or *non compos*, she is regarded as incapable of giving consent; but the mere fact that she is weak-minded does not disable her from consenting to the act.

ID. — WHERE, ON TRIAL FOR RAPE, EVIDENCE TENDS TO SHOW THAT PROSECUTRIX WAS WEAK-MINDED, but not that she was idiotic, or so *non compos* as to be incapable of consenting, it is error to refuse to charge that "if the jury have a reasonable doubt that the defendant did the act with or without the consent of the prosecutrix, although they may believe there was force used, and she was a woman of weak mind, they must acquit the defendant."

ID. — SINCE CONSENT GIVEN BY WOMAN MAY BE IMPLIED as well as express, a charge that "if the jury believe from the evidence that the conduct of the prosecutrix was such toward defendant at the time of the alleged rape as to create in the mind of the defendant the honest and

reasonable belief that she had consented, or was willing for defendant to have connection with her, they must acquit the defendant," is proper, and to refuse it is error.

1D. — ON TRIAL FOR RAPE, CHARACTER OF PROSECUTRIX FOR CHASTITY, or the want of it, is competent evidence as bearing on the probability of her consent to the defendant's act. But the impeachment of her character in this respect must be confined to general evidence of her reputation, except that she may be interrogated as to her previous intercourse with the defendant.

INDICTMENT for rape. The defendant requested certain charges, the substance of which appear in the head-note and opinion. Each charge being refused by the court, the defendant excepted.

W. L. Parks and H. C. Wiley, for the appellant.

T. N. McClellan, attorney-general, *contra*.

SOMERVILLE, J. The indictment, following the form authorized by statute (Crim. Code, 1886, p. 275, Form No. 69), charges that the defendant "forcibly ravished" the prosecutrix.

It is an essential constituent of the crime of rape that the act should be intended to be done with force, actual or constructive, and without the woman's consent. The forms of indictment in the code, both for rape and for an assault with intent to ravish, each use the word "forcibly" as necessary in the description of these offenses, and at common law it was equally regarded as an essential element in the description of this high crime against law and morality: *McNair v. State*, 53 Ala. 453; *Dawkins v. State*, 58 Id. 376; 29 Am. Rep. 754; 1 Wharton's Crim. Law, 9th ed., sec. 562; *State v. Murphy*, 6 Ala. 765; *Lewis v. State*, 30 Id. 54; *Waller v. State*, 40 Id. 325.

It is true that the element of force need not be actual, but may be constructive or implied. If the woman is mentally unconscious from drink or sleep, or from other cause is in a state of stupefaction, so that the act of the unlawful carnal knowledge on the part of the man was committed without her conscious and voluntary permission, the idea of force is necessarily involved in the wrongful act itself,—the act of penetration. But even in cases of this kind the intent to use force, if necessary to accomplish the offense, is essential to criminality: 1 Wharton's Crim. Law, 9th ed., sec. 550.

An acquiescence obtained by duress, or fear of personal violence, will avail nothing, the law regarding such submission as no consent at all. If the mind of the woman is overpow-

ered by a display of physical force, through threats, expressed or implied, or otherwise, or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man would be rape: 1 Wharton's Crim. Law, sec. 557; 2 Bishop's Crim. Law, 7th ed., sec. 1125; 3 Greenl. Ev., 14th ed., sec. 211.

The mere fact that a woman is weak-minded does not disable or debar her from consenting to the act. It has been said that a woman with a less degree of intelligence than is requisite to make a contract may consent to carnal connection, so that the act will not be rape in the man, but "if she is so idiotic as to be absolutely incapable of consent, the connection with her is rape": 2 Bishop's Crim. Law, sec. 1121. The principle, as expressed by another high authority, is, that "carnal intercourse with a woman, incapable, from mental disease (whether that disease be idiocy or mania), of giving consent, is rape": 1 Wharton's Crim. Law, sec. 560.

The evidence tends to show that the prosecutrix was weak-minded merely, not that she was idiotic, or so *non compos* as to be incapable of giving consent to the act of carnal connection with the defendant. In view of this fact, and the principles above announced, we are of opinion that the circuit court erred in refusing the second and third charges requested by the defendant.

The fourth charge requested by the defendant should also have been given. The consent given by the prosecutrix may have been implied as well as express, and the defendant would be justified in assuming the existence of such consent if the conduct of the prosecutrix towards him at the time of the occurrence was of such a nature as to create in his mind the honest and reasonable belief that she had consented by yielding her will freely to the commission of the act. Any resistance on the woman's part falling short of this measure would be insufficient to overcome the implication of consent.

The circumstances under which it is permissible to prove the details of a complaint by a prosecutrix, as to an alleged rape, are fully discussed in *Barnett v. State*, 83 Ala. 40, and *Griffin v. State*, 76 Id. 29; and the principles there announced will be a sufficient guide for the court on another trial.

That the prosecutrix was a woman of chaste or unchaste character was perfectly competent evidence, under all the authorities, as bearing on the probability or improbability of her consent to the alleged act of intercourse with the defendant.

The impeachment of her character in this particular must, however, be confined to general evidence of her reputation. Particular instances of her unchastity cannot be proved for this purpose, except that she may be interrogated as to her previous intercourse with the prisoner, although not as to particular instances with third persons: 3 Greenl. Ev., 14th ed., sec. 214; 1 Wharton's Crim. Ev., 9th ed., sec. 568; *Boddie v. State*, 52 Ala. 395.

We discover no other errors in the record than those above pointed out.

The judgment is reversed, and the cause remanded. The prisoner will, in the mean while, be retained in custody until discharged by due process of law.

RAPE, GENERALLY: See the extended note to *Smith v. State*, 80 Am. Dec. 355.

FORCE, ACTUAL OR CONSTRUCTIVE, IS A NECESSARY ELEMENT OF THE CRIME OF RAPE: See *Bailey v. Commonwealth*, 3 Am. St. Rep. 87, and note. Sexual intercourse with insane woman who consents is not rape, unless the man, knowing the woman to be insane, takes advantage of that fact to carnally know her, and she is unconscious of the nature of the act: *People v. Crosswell*, 87 Am. Dec. 774, and note.

GENERAL CHARACTER OF PROSECUTRIX IS IN ISSUE ON TRIAL FOR RAPE: *State v. Reed*, 94 Am. Dec. 337.

EX PARTE BOSCOWITZ.

[84 ALABAMA, 463.]

WITNESS CANNOT BE COMPELLED TO ANSWER ANY QUESTION the answer to which would tend to criminate him; but this privilege does not extend to an answer the tendency of which is merely to humiliate and degrade the witness. And if the prosecution for the offense is barred by the statute of limitations, the reason of the privilege ceases, and the witness should be compelled to answer.

WITNESS. — ON TRIAL OF FEMALE CHARGED WITH BEING COMMON PROSTITUTE, witness has privilege of refusing to answer whether he has had sexual intercourse with the accused, on the ground that his answer would constitute an essential link in the chain of testimony sufficient to convict him of a criminal offense.

Arrington and Graham, and Rice and Wiley, for the petitioner.

Thomas N. McClellan, attorney-general, contra.

CLOPTON, J. The petitioner was adjudged guilty of a contempt, and ordered to be imprisoned, for refusing to answer a

question propounded to him as a witness. His refusal was based on the ground that his answer would tend to criminate, humiliate, and degrade him. We may discard from consideration the ground that the tendency of the answer would be to humiliate and degrade. The privilege of refusing to answer is restricted to questions answering which may tend to criminate the witness, or expose him to punishment: *Hall v. State*, 40 Ala. 698. It is an established and universally accepted maxim of the common law that a witness shall not be compelled to answer any question that tends to criminate him, or to expose him to a criminal prosecution, or to a penalty, which finds expression in the constitutional guaranty that no person shall be compelled to give evidence against himself. The right of exemption extends, not only to answers which may criminate, but also to such as may tend to criminate.

On the trial of a female charged with being a common prostitute, and having no honest employment whereby to maintain herself, under section 4218 of the Code of 1876, the petitioner was called by the prosecution and sworn as a witness. Having testified that he was a witness before the grand jury in July, 1887, when the indictment was found, the question was proposed to him, whether or not he had had sexual intercourse with the accused within six months prior to the time he was before the grand jury. The court instructed the witness that it was his duty, and directed him, to answer the question. The witness refused to answer; whereupon the court adjudged him guilty of a contempt, and ordered his imprisonment. By the rule as held in this state, it was the province of the court to determine, in the first instance, whether a direct answer to the question proposed would furnish criminalizing evidence against the witness. The rule is founded on the duty of the court to take care that the exercise of the privilege shall not extend, by mistake or error of the witness, or on simulated pretense, to the suppression of evidence, which is necessary to the due administration of the law, and in giving which there can be no real and appreciable danger of crimination, or exposure to prosecution, or to any kind of punishment: *Calhoun v. Thompson*, 56 Ala. 166; 28 Am. Rep. 754. It is also of the highest importance that the witness shall be protected in the proper and rightful exercise of his privilege, which has for its object the security of life and liberty. The court should not require the witness to

fully explain the manner in which his answer may tend to criminate him, as the purpose of the privilege may be thereby defeated; nor should he be required to answer, when he claims his privilege, unless, from the nature of the answer and the circumstances of the case, it is evident to the court that his answer cannot have any tendency to expose him to a criminal charge or prosecution, or to a penalty. If the prosecution for the offense is barred by the statute of limitations, the reason of the privilege ceases, and the witness should be compelled to answer. The record only presents the question proposed to the witness, and the nature of the case which was being tried. No other circumstances are disclosed, and the statute of limitations had not barred a prosecution at the time the witness was being examined. The question, therefore, is, whether his answer would tend *prima facie* to expose him to a criminal charge.

Under the statutes, there are crimes in which sexual intercourse is an important and essential fact. Reference to one will suffice. Section 4012 of Code of 1886 makes it an offense, indictable and punishable, for any man and woman to live together in adultery or fornication. It is true that the statute was not designed to punish a single act, or occasional acts of illicit intercourse. It was intended to prohibit and punish a state or condition of cohabitation, intended by the parties to be continuous at their pleasure. This state of cohabitation may be assumed in a single day, if such is their purpose; and if the parties live together in adultery or fornication for a single day, intending a continuance of the connection, the offense is complete, though it may be unexpectedly broken off by some extraneous cause: *Hall v. State*, 53 Ala. 463. While a single act, or occasional acts, are not offenses against the criminal law, sexual intercourse is an essential element of the statutory crime. A witness should not be compelled to answer a question the answer to which will disclose an important and essential fact of the crime, to a prosecution for which he may be exposed, or which constitutes a necessary and essential link in the chain of testimony sufficient to convict. If the witness is compelled to answer a question which calls for only one act of criminal intercourse, which would not of itself tend to criminate, question may nevertheless succeed question, until the answers to all would furnish sufficient evidence on which to base a criminal prosecution. A witness should not be compelled to answer as to any one act the con-

stant and frequent repetition of which may constitute the statutory offense, and furnish sufficient evidence to convict. On a prosecution for living together in adultery or fornication, all the constituents of the offense may be established except the fact of sexual intercourse, and this be shown by the answer of the witness to the question proposed, thus compelling him to furnish an essential link in the chain of testimony: *French v. Venneman*, 14 Ind. 282; *Ford v. State*, 29 Id. 541; 95 Am. Dec. 658.

The order of the city court adjudging the petitioner guilty of a contempt, and ordering his imprisonment, must be quashed, and the petitioner discharged.

WITNESS NEED NOT ANSWER QUESTION WHICH WILL TEND TO CONVICT HIM of a crime: *Chamberlain v. Willson*, 36 Am. Dec. 356; but he cannot refuse to answer because the answers would have a tendency to his disparagement or disgrace: *State v. Patterson*, 38 Id. 699.

LIDDELL v. CHIDESTER.

[84 ALABAMA, 508.]

CONTRACT OF EMPLOYMENT, entered into by telegraphic correspondence, agreeing to serve for "one thousand dollars a year," unexplained, is a contract for a year's service for that sum, to be paid in gross.

REMEDIES OF EMPLOYEE WRONGFULLY DISCHARGED BEFORE END OF TERM:

1. He may elect to treat the contract as rescinded, and sue on a *quantum meruit*; or 2. He may sue for an entire breach of the contract by the defendant, and recover all damages sustained up to the trial; or 3. He may wait until his wages would mature under the terms of the contract, and sue and recover as upon performance on his part.

WHEN WAGES ARE PAYABLE IN INSTALLMENTS, SUITS MAY BE BROUGHT ON the several installments as they mature.

PLAINTIFF CANNOT SPLIT UP SINGLE CAUSE OF ACTION into two or more suits, and if he does so, and recovers part of his demand, this is a waiver of and bar to the residue of his claim.

JUDGMENTS. — ELEMENTS NECESSARY TO CONSTITUTE JUDGMENT IN ONE SUIT BAR to a second suit are: 1. That the issue in the second suit, upon which the judgment is brought to bear, was a material issue in the first suit, necessarily determined by the judgment therein; and 2. That the former judgment was upon the merits.

RECOVERY OF JUDGMENT BY DISCHARGED EMPLOYEE, had in an action claiming wages for the month in which he was discharged, is conclusive of the fact that his wages were due and payable in monthly installments, and also estops the defendant from denying that he discharged the plaintiff without cause.

ACTION to recover balance alleged to be due for services rendered. The opinion states the material facts. At the plain-

tiff's request, the court charged the jury as follows: 1. "If the jury believe all the evidence, they must find a verdict for the plaintiff." 2. "If the jury believe the evidence, the plaintiff would be entitled to recover the balance due under said contract for each month, or part of a month thereof, from the first day of August, 1885, at the contract price, until the end of the contract year, which was February 29, 1886, with interest thereon from this last date." The defendant excepted.

Arrington and Graham, for the appellant.

Troy, Tompkins, and London, contra.

STONE, C. J. The most important inquiry in this case, alike of law and of fact, was, whether Chidester was employed by Liddell to perform a year's service for one thousand dollars, to be paid in gross, or to be paid in monthly installments. If the former, then the recovery and enforcement of the judgment for a part of the demand in June, 1886, is a complete defense and bar to this action, and nothing should be recovered. This, under the well-known principle that a plaintiff cannot split up a single cause of action into two or more suits; and if he does so, and recovers a part of his demand, this is a waiver of and a bar to the residue of his claim, be it much or little: *Oliver v. Holt*, 11 Ala. 574; 66 Am. Dec. 228; *O'Neal v. Brown*, 21 Ala. 482; *S. & N. R. R. Co. v. Henlein*, 56 Id. 368; *Wharton v. King*, 69 Id. 365.

If, on the other hand, the wages were due and demandable at the end of each month, then the recovery of one installment, unreversed, is a complete answer to and preclusion of all defenses to the merits which were or could be pleaded to such second suit: *Rakes v. Pope*, 7 Ala. 161; 3 Brickell's Digest, p. 580, secs. 75 et seq.; *Wharton on Civil Evidence*, sec. 758; *Gardner v. Buckbee*, 3 Cow. 120; 15 Am. Dec. 256.

The contract in this case was by telegraphic correspondence. Liddell's offer was: "If one thousand dollars a year is an inducement, come immediately. Answer." Chidester's acceptance was: "Will accept one thousand dollars a year." These communications, unexplained, show a single contract for a year, the wages to be one thousand dollars in gross.

There was testimony that up to the time of Chidester's discharge his wages were paid to him monthly; but the testimony on this subject was somewhat in conflict: *Partridge v. Forsyth*, 29 Ala. 200; *Com. Fire Ins. Co. v. Capital City Ins. Co.*, 81 Id. 320; 60 Am. Rep. 162.

It is contended for the appellee that the verdict and judgment in the former suit—that which was tried in 1886—are conclusive that Chidester's wages were due and payable in monthly installments; and that without such finding the jury could not have rendered a verdict in his favor. The elements necessary to constitute a judgment in one suit a bar to a second suit are: "1. That the issue in the second action, upon which the judgment is brought to bear, was a material issue in the first action, necessarily determined by the judgment therein; 2. That the former judgment was upon the merits": Freeman on Judgments, sec. 256. "It is only of those matters which, as premises, enter into and uphold the judgment (the judgment being the conclusion of the syllogism), and connected, qualifying matters, which, if produced, would change or impair the legal force and effect of the cause of action itself on which the judgment was rendered, that the judgment pronounced becomes conclusive": *Haas v. Taylor*, 80 Ala. 459. To be a bar, it must appear that the fact claimed to have been established "was essential to the finding of the former verdict": 1 Greenl. Ev., sec. 534; *Chamberlain v. Gaillard*, 26 Ala. 504; *Gilbreath v. Jones*, 66 Id. 129; *McCall v. Jones*, 72 Id. 368; *Hanchey v. Coskrey*, 81 Id. 149.

In the first suit, instituted before a justice of the peace, the cause of action was described as follows: "The plaintiff claims of defendant \$41.50, due by account on 26th of July, 1885, for salary due and for services rendered by plaintiff to the defendant." When the case reached the circuit court by appeal, a new complaint was filed with three counts, two common and one special. The first count was "for work and labor done by the plaintiff for the defendant, and at his request, during the month of July, 1885." The second count was for the "sum of fifty dollars, due by account stated between the plaintiff and the defendant on, to wit, the first day of August, 1885." The third count was a special count. It averred that there was a contract for a year, the wages to be paid in monthly installments of \$83.33; that plaintiff, Chidester, was serving, and ready to serve, when on July 15, 1885, without fault on his part, Liddell discharged him, paying him on that month's wages thirty dollars, leaving the balance, \$41.50, unpaid. For that balance, with interest, this count claimed judgment. The recovery was for that sum, with interest, which was acquiesced in and paid.

It is settled in this state, by many decisions, that when Chi-

dester was discharged he had the option of one of three remedies, if the discharge was wrongful: 1. He could have elected to treat the contract as rescinded, and sue on a *quantum meruit* for any labor he may have performed; 2. He could have sued at once for an entire breach of the contract by the defendant, in which event he would have been entitled to recover all damages he suffered up to the trial, not exceeding the entire wages he could have earned under the contract; or 3. He could have waited until his wages would mature under the terms of the contract, and sue and recover as upon performance on his part. Each of these alternative rights, as we have seen, was dependent on his fixing on Liddell the fault of his discharge: *Strauss v. Meertief*, 64 Ala. 299; 38 Am. Rep. 8; *Davis v. Ayres*, 9 Ala. 292; *Ramey v. Holcombe*, 21 Id. 567; *Fowler v. Armour*, 24 Id. 194; *Holloway v. Talbot*, 70 Id. 389; *Wilkinson v. Black*, 80 Id. 329; 3 Wait's Actions and Defenses, 606. And when wages are payable in installments, suits may be brought on the several installments as they mature: *Davis v. Preston*, 6 Ala. 83.

It is manifest that the former suit was not brought on the first of the alternate grounds stated above. There is nothing to show that it relied on the rescission or abandonment of the contract; and if it had, there were no past services actually rendered and unpaid for on which to found a recovery. The suit was for that part of the salary for July which had not been paid. Nor was the suit brought on the second of the grounds,—an entire breach of the contract. On the contrary, it treated the contract as continuing through the month of July, and sued for the wages alleged to have been constructively earned in July, after the discharge.

The former suit was then brought on the third of the grounds, treating the contract as still binding on Liddell, and claiming wages according to its terms. It was brought July 27, 1885, the first day after the completion of one of the months of the wage-year. If the contract was for the payment of one thousand dollars in gross at the end of the year, February 26, 1886, that suit was prematurely brought, and there could have been no recovery. It was indispensable to plaintiff's right of recovery to show that by the terms of the contract his wages were due in monthly installments, one installment of which had matured. This was "essential to the finding of the former verdict."

The foregoing facts are placed beyond dispute in the record

before us. They estop Liddell from denying that by the terms of his contract with Chidester he was to pay him wages in monthly installments, and that he discharged plaintiff without cause. And the same inevitable result would follow, no matter what proof he might offer that the contract was for the payment of Chidester's salary in gross, and that he had good grounds for discharging him.

We have not deemed it necessary to consider the rulings on demurrer. Whether right or wrong, they could not have affected the defendant injuriously.

There was no error in the charges of the court.

Affirmed.

EMPLOYEE WRONGFULLY DISCHARGED IS ENTITLED TO RECOVER COMPENSATION for the whole term of employment: *King v. Steiren*, 84 Am. Dec. 419; but if he sues before the end of the term, his action is for breach of contract, and a judgment for damages will be a bar to further recovery: *Booge v. Pacific R. R. Co.*, 82 Id. 160; *Strauss v. Meertief*, 38 Am. Rep. 8.

RECOVERY OF PART OF ENTIRE DEBT WILL BAR THE RECOVERY OF THE RESIDUE: See *Baker v. Baker*, 75 Am. Dec. 243.

THWEATT v. McCULLOUGH.

[84 ALABAMA, 517.]

ASSUMPSIT — BURDEN OF PROOF. — WHERE MONEY IS DELIVERED BY ONE PERSON TO ANOTHER, WITHOUT CONSIDERATION, to be applied to the use of a third person, the order to apply may be countermanded by the depositor at any time before the money has been appropriated to the uses intended, and in an action by him for the money, the burden is on the defendant to show that he had applied it as directed.

GUARDIAN AND WARD. — IN ACTION BY GUARDIAN TO RECOVER FUNDS PLACED BY HIM in the defendant's hands, to be specially applied to the use of the plaintiff's ward, proof that the plaintiff had been sued by another person for the tuition of the ward is, as to the defendant, *res inter alios acta*, or mere hearsay evidence, and inadmissible.

GIFT. — IF ONE DECLINES TO BECOME DONEE OF DEBT by taking the debtor's note payable to her as proposed by the donor, but for the purpose of placing it beyond the reach of her creditors procures the note to be made payable to her minor child, the gift to her was never perfected, and she is estopped from assailing the validity of the transfer to her child.

ASSUMPSIT. The facts appear in the opinion.

Lomax and Tyson, for the appellant.

Rice and Wiley, contra.

SOMERVILLE, J. The evidence tends to show that the plaintiff, McCullough, had, from time to time, placed funds in the hands of the defendant, Thweatt, to be specially applied by him to the uses of a certain minor, who was the ward of the plaintiff, and for whom he had been appointed guardian.

This fact being satisfactorily proved, with the amount of the funds thus deposited with the defendant, the burden would be upon the defendant to show that he had applied the money as directed. Where money is delivered by one person to another, without any present valuable consideration, with direction to apply for the use of a third person, the order to apply may be countermanded by the depositor at any time before the receiver has appropriated it to the uses intended, or has, expressly or impliedly, entered into some arrangement with the other party by which he would be prejudiced by the revocation of the original order: *Coleman v. Hatcher*, 77 Ala. 217; 2 Greenl. Ev., sec. 119. The bringing of the present suit operated in this case to cast on the defendant the burden of proving that he had appropriated the funds received from the plaintiff to the uses designated, and the court, in effect, so ruled on the trial.

The circuit court, however, improperly allowed the fact to be proved that the plaintiff had been sued for the tuition of his ward. This was, at most, merely a naked assertion by the plaintiff in that action that the tuition had never been paid by the defendant out of the funds deposited with him for that purpose, dignified, it may be, by a resort to a court of justice. As to the defendant, it was *res inter alios acta*, or mere hearsay evidence, and was inadmissible to prove that he had not paid the debt in question. For this error the judgment must be reversed.

We notice but one other point which will be likely to arise again on another trial. This is the *status* of the fund accruing from the Huggins note. It is claimed by the defendant that this note was in fact the property of the defendant's wife, as a part of her statutory separate estate, although it was made payable to the plaintiff's ward, who was her daughter. The maker, Huggins, owed Mrs. Barclay, the mother of Mrs. Thweatt, and the grandmother of the ward. Mrs. Barclay proposed to have the note made payable to Mrs. Thweatt by way of a gift to her. She being then a widow, and financially embarrassed, permitted or procured the note to be made payable to her minor daughter, above alluded to as the plaintiff's

ward, as the evidence tends to show, in order to prevent her creditors from reaching it. If this be true, the note became the property of the daughter, and never belonged to the mother. By authorizing the note to be made payable to the daughter, she declined to become the donee of the debt due by Huggins; and moreover, by procuring it to be made payable to another for the purpose of placing it beyond the reach of her creditors, she is in the attitude of a grantor who is not permitted to reclaim property that has been fraudulently aliened to a grantee or donee. The law punishes the grantor by estopping him from assailing the validity of his transfer, as the best and only practical mode of discouraging such covinous transactions, and promoting honesty and fair dealing between debtor and creditor. It is the policy of the law to make the fraudulent transaction as perilous as possible.

Reversed and remanded.

GIFT, TO BE VALID, MUST BE EXECUTED: See *Craeford's Appeal*, 100 Am. Dec. 609.

WOODS v. MONTEVALLO COAL AND TRANSPORTATION COMPANY.

[84 ALABAMA, 560.]

EVIDENCE. — TITLE BOND IS ADMISSIBLE AS EVIDENCE IN ACTION OF EJECTMENT WITHOUT PROOF of its execution, it having been executed nearly thirty years before the commencement of the action, and coming from the custody of one claiming an interest in the land, unaccompanied by any circumstance casting suspicion on its genuineness.

RECEIPT OVER TWENTY YEARS OLD, PURPORTING TO BE EXECUTED BY ATTORNEY OF RECORD for the plaintiff in a judgment, acknowledging the satisfaction of the judgment, is admissible in evidence to show such satisfaction, without proof of its execution.

ONE CLAIMING IN PRIVACY WITH ANOTHER, WHETHER BY BLOOD, estate, or law, occupies the same situation with such other as to any judgment for or against him, and the record of the judgment is equally admissible as evidence against either.

TO JUSTIFY ADMISSION OF SECONDARY EVIDENCE OF DEED, it is not necessary to prove its loss beyond all possibility of mistake. A reasonable probability of its loss is sufficient; and this may be shown by a *bona fide* and diligent search, fruitlessly made for it in places where it was likely to be found.

EXISTENCE OF FACT CANNOT BE PROVED BY REPUTATION or notoriety, but when the fact is otherwise established, its general notoriety may be shown to charge a person in the neighborhood with knowledge of it.

ADVERSE POSSESSION. — **POSSESSION OF VENDEE OF LAND UNDER TITLE BOND IS PRESUMPTIVELY ADVERSE** from the time he pays the purchase-money, and although the bond was executed by one having no title or authority to convey, and was not recorded it may be good as color of title to show the character and extent of the possession asserted.

ACTUAL OCCUPATION AND IMPROVEMENT OF PORTION OF TRACT OF LAND, by one who enters thereon with a deed or color of title to it, will usually be construed as a possession of the whole, co-extensive with the boundaries described in the written instrument under which he claims title, if there be no antagonistic possession, and especially where he makes a notorious claim to the whole by any acts suitably asserting his claim of ownership.

WHERE VENDOR CONVEYS TWO SEPARATE AND DISTINCT TRACTS OF LAND, to only one of which he has title, an entry upon and occupation of that tract by the vendee will not, of itself, operate as a disseisin of the owner of the other tract to which the vendor had no title. Yet, in such case, the constructive possession of the vendee or occupant may become adverse by acts of dominion or ownership properly asserted over the other tract, in the absence of any actual possession by the true owner.

TO CONSTITUTE ADVERSE POSSESSION, the use made of the land must be suited to its nature, adaptability, and locality. All that the law requires is, that the possession, or rather the acts of dominion by which it is sought to be proved, shall be of such a character as may be reasonably expected to inform the true owner of the fact of possession and adverse claim of title.

QUESTION OF ADVERSE POSSESSION IS FOR THE JURY, in view of all the evidence, and it is error to withdraw it from their consideration.

EJECTMENT. — **EQUITABLE TITLE AVAILS NOTHING IN ACTION OF EJECTMENT** apart from the operation of the statute of limitations.

STATUTORY action of ejectment brought by Thomas Andrew Woods against the Montevallo Coal and Transportation Company for the recovery of certain lands. Facts set out in the opinion, taken in connection with the following charge at the request of the defendant, sufficiently present the case: "If the jury believe from the evidence that the Alabama Coal Mining Company obtained from Thomas Woods, in 1855, the contract given in evidence, and that from thence on they claimed the lands involved in this suit under said contract; and that in 1863 said company sold these lands and others, including those upon which is situated the 'Irish Pit' testified about, and conveyed the same to the Montevallo Coal Mining Company, and that that company conveyed all of said lands to the Central Mining and Manufacturing Company in 1867; and that each of said companies was in the actual possession and occupation of said lands upon which the 'Irish Pit' is situate, and during all of said time openly and notoriously claimed title to the lands in controversy under their said deeds; and that such claim of title, while said lands were so

claimed and occupied, was generally known in the neighborhood; and if they further believe that plaintiff resided in said neighborhood while said companies claimed said title, and that for more than ten years before the commencement of this suit, defendant, and those from whom it derives title, were in the actual occupancy, controlling the lands upon which the pit known as the 'Irish Pit' is situate, claiming the same as theirs under said deeds, and not recognizing the title of plaintiff,—then they must find for the defendant, although they believe the Montevallo Coal Mining Company had a title to said 'Irish Pit,' and have none to the lands sued for." To this charge the plaintiff excepted.

C. G. Wagner, J. T. Heflin, and W. S. Cary, for the appellants.

Troy, Tompkins, and London, and Wilson and Lyman, contra.

SOMERVILLE, J. 1. The bond for title, purporting to be executed by Thomas Woods on December 1, 1855, or nearly thirty years prior to the commencement of this action, was properly admitted in evidence, in connection with the other proof showing the payment to him by the vendee of the purchase-money due for the land.

It came from one claiming an interest in the land, unaccompanied by any circumstance casting suspicion on its genuineness. It was admissible, therefore, without any proof of its execution, and without preliminary proof of possession under it, if otherwise relevant,—an inquiry which we next consider: *White v. Hutchins*, 40 Ala. 253; 88 Am. Dec. 766; *England v. Hatch*, 80 Ala. 247; 1 Greenl. Ev., sec. 144; Sharswood's *Starkie on Evidence*, 521–523.

2. Where a vendee of land pays the purchase-money due by him to the vendor, his possession under a bond for title at once commences presumptively to be adverse: *Beard v. Ryan*, 78 Ala. 37; *Morgan v. Casey*, 73 Id. 223; *Drew v. Towle*, 30 N. H. 531; 64 Am. Dec. 309. Such a written instrument, therefore, although executed by one having no title or authority to convey, and unrecorded, would be good as color of title to show the character and extent of the possession asserted, and the intent with which such possession is taken: *Standifer v. Swann*, 78 Ala. 88; *Ladd v. Dubroca*, 61 Id. 25; Angell on *Limitations*, sec. 404, notes 1, 2; *Lea v. Polk County Copper Co.*, 21 How. 493.

3. The record of the court proceedings in the case of *Woods v. Alabama Coal Mining Co.* was competent to show a collection by process of law of the purchase-money due on the land, the parties to that suit being respectively the vendor and vendee in the bond for title. The receipt, purporting to be executed by the attorneys of record for the plaintiff in that action, acknowledging the satisfaction of the judgment, being over twenty years of age, proved itself, and was admissible to show such payment, a like rule applying to receipts as to other ancient writings: Sharswood's Starkie on Evidence, 523, 524. These proceedings were not *res inter alios acta*, because the existence and satisfaction of the judgment affected the *status* of the defendant in that judgment towards the lands in controversy, and the defendant in this suit derives title from that corporation. Where one claims in privity with another, whether by blood, estate, or law, he is in the same situation with such person as to any judgment for or against him, for judgments bind privies as well as parties.

4. The receiver's original certificate of purchase, although taken out in the name of the plaintiff, and not assigned by him in writing, being in the possession of the defendant, was presumptively there by lawful transfer, and was admissible at least to show color of title, and to subserve the function of an instrument of that character. The plaintiff, moreover, is in no condition to object to the admissibility of such certificate, as it tended also in one aspect to support his title.

5. The testimony of Holt sufficiently proved the probable loss of the deed to him from Williams to authorize the introduction of secondary evidence of its contents. To justify the admission of such evidence, it is not necessary to prove the loss of the document beyond all possibility of mistake. A reasonable probability of its loss is sufficient, which may be shown by a *bona fide* and diligent search, fruitlessly made for it in places where it was likely to be found: *United States v. Sutter*, 21 How. 170.

6. While the existence of a fact cannot be proved by reputation or notoriety, yet when the fact is otherwise established, its general notoriety in a neighborhood may be proved as competent evidence to charge one resident in such vicinity with knowledge of it: *Humes v. O'Bryan*, 74 Ala. 64, 81; *Price v. Mazange*, 31 Id. 701. Under this rule, the question propounded to the witness Harris, and the answer elicited, were relevant.

7. It is not denied that the plaintiff is entitled to recover in this case, unless the defendant and those under whom it claims are shown to have had an adverse possession of the lands in controversy for at least ten years before the commencement of the suit, and under such circumstances as to operate as a bar to the action under the influence of the statute of limitations. The title of the plaintiff is shown by a patent from the general government, issued in June, 1857. The defendant seeks to overcome this by first showing a written agreement of the plaintiff's father to convey to the Alabama Coal Mining Company the tract in controversy (320 acres), and another tract of as much more, which appears to have been adjacent. The vendor, as we have seen, delivered to the vendee his bond for title, dated December 21, 1855, about eighteen months before the date of the patent, and the purchase-money was paid a few years afterwards. The land was uninclosed woodland, wild and mountainous, not suitable for cultivation, but valuable chiefly for timber, and prospectively, perhaps, for the mining of coal. These lands were afterwards included in a deed made by the Alabama Coal Mining Company to the Montevallo Coal and Mining Company, conveying between four and five thousand acres of wild lands, on some of which they were in actual occupancy, operating a coal mine. The vendee of these lands, in April, 1863, conveyed between twelve and fourteen hundred acres of them to the Central Mining Company, including the one hundred and sixty-acre tract in controversy, and including two or three forty-acre tracts which were in their actual occupancy, and upon which one or more coal mines were worked, and some houses erected for occupying tenants. Through various mesne conveyances, this tract, omitting three or four forties not in actual occupation or in controversy, came into the possession of the defendant, and was claimed by it under color of title at least, some of the written muniments of title not being proved to have been attested or acknowledged.

How far color of title to the land, accompanied by actual occupancy of a part, will extend the occupant's possession constructively to the whole tract included in the deed, is not definitely settled, and, we may add, is a subject full of difficulty. The general rule is, that where one enters upon a tract of land, with a deed or color of title to it, his actual occupation and improvement of a portion of it will usually be construed as a possession of the whole, co-extensive with the

boundaries described in the written instrument under which he claims title, if there be no antagonistic possession: *Burks v. Mitchell*, 78 Ala. 61, and cases cited; *Farley v. Smith*, 39 Id. 38. Particularly is this true where the person so entering makes a notorious claim to the whole by any acts suitably asserting his claim of ownership: *Crowell v. Bebee*, 10 Vt. 33; 33 Am. Dec. 172.

The authorities limit the application of this rule by the further principle that where a vendor conveys two separate and distinct tracts of land, to only one of which he has title, an entry upon and occupation of that tract of which his title is good will not, without more, operate as a disseisin of the owner of the other tract to which the vendor had no title: *Bailey v. Carleton*, 12 N. H. 9; 37 Am. Dec. 190; *Stewart v. Harris*, 9 Humph. 714. A sufficient reason for this, perhaps, is, that such actual possession of the occupant is perfectly consistent with the constructive possession of the real owner of the other tract which the law attaches to the true title, and does not, therefore, *per se*, disturb it. Nor is there anything in one's occupation of his own land, to which he has title, which would impute notice to another that he claims an unreasonably extended possession, constructively asserted under a paper title, which may be either unrecorded, or, if recorded, does not necessarily operate as notice to strangers: *Fenno v. Sayre*, 3 Ala. 458.

But such constructive possession of the occupant may, of course, become adverse by acts of dominion or ownership properly asserted over the unoccupied tract, in the absence, we repeat, of any actual possession by the true owner. And it is evident that less notoriety, and even less frequency of such acts of ownership, will be required with possession under color of title than without it: *Hodges v. Eddy*, 38 Vt. 327; Sedgwick and Wait on Trial of Title to Land, 2d ed., sec. 771. The use made of the land must be suited to its nature, adaptability, and locality. In a recent case it was said that the cutting and removing timber from wild land, unfit for any other use, might amount to a possession, and, if accompanied by color of title, might constitute a disseisin: *Childress v. Calloway*, 76 Ala. 128, 133; *Rivers v. Thompson*, 46 Id. 335; *Burks v. Mitchell*, 78 Id. 61. In another case it was held, where the occupant cleared, fenced, and improved two hundred acres of the tract consisting of fifteen hundred acres, and paid taxes on the whole, cutting trees from the uninclosed

part for fencing, fire-wood, and timber, his actual possession of the part extended over the whole by color of title which he held to it: *Munro v. Merchant*, 28 N. Y. 9. The doctrine of adverse possession rests upon the presumed acquiescence of the party against whom it is held, and such acquiescence again presumes knowledge. All the law requires, therefore, is, that the possession, or rather the acts of dominion by which it is sought to be proved, shall be of such a character as may be reasonably expected to inform the true owner of the fact of possession and an adverse claim of title: *Foulke v. Bond*, 41 N. J. L. 547; *Farley v. Smith*, 39 Ala. 44. It is sufficient if such owner has either knowledge or notice of such fact of possession and claim, which, as said by Baron Parke in *May v. Chapman*, 16 Mees. & W. 355, "mean not merely express notice, but knowledge, or the means of knowledge to which the party willfully shuts his eyes": *Wells v. Sheerer*, 78 Ala. 142.

The evidence shows that the lands in dispute were never occupied or used by any one for any purpose, except that plaintiff resided on them two or three years prior to the war, and the defendant cut a considerable amount of timber from them about two years prior to this suit. But after the bond for title was executed to the Alabama Coal Mining Company, about the year 1857, the plaintiff abandoned the actual occupancy of the lands, and the vendee company sold the house in which he lived to one Calvin Harris, who removed it from the land. The plaintiff remained in the neighborhood, in the employment of the company, until about the year 1876 or 1877, when he removed from the state. Several intermediate conveyances, by deed, mortgage, and under decree of chancery court, were made at various times between the years 1860 and 1882, of the land above mentioned as conveyed to the Central Mining Company in April, 1863, or fractional interests therein,—a tract, as we have said, of twelve hundred or fourteen hundred acres, embracing the land in controversy, and other lands, some of which were in the actual possession of the grantors. The evidence thus tends to show that these dealings with the lands of the plaintiff, including the appropriation and sale of the house once occupied by him, were with his knowledge and acquiescence. Whether they would authorize a jury to find such an abandonment of the premises by the plaintiff, and such a recognition of the constructive possession of the land by the

defendant and those under whom it claims, as under color of title would amount to adverse possession sufficient in character and duration to bar this action under the statute of limitation of ten years, we do not decide, because the record raises no such question. But the charge given by the court decides, as matter of law, that if these facts are believed by the jury, the action is barred. This withdrew the whole question of adverse possession from the consideration of the jury, which in this case was error.

Nor does the evidence, in our opinion, raise any presumption, as matter of law, that the plaintiff ever executed a conveyance of the lands to the Alabama Coal Mining Company, whatever may be the presumption from lapse of time as to his father's having made such conveyance. And it avails nothing in this action to infer a verbal authority on the part of the plaintiff for his father, Thomas Woods, to make such conveyance, as this would give but an equitable interest in the land to the vendee, and such a title, apart from the operation of the statute of limitations, would obtain no recognition in a court of law: *Standifer v. Swann*, 78 Ala. 88; *Hooper v. Columbus and Western R'y Co.*, 78 Id. 213

For the error in giving the charge requested by the defendant, the judgment is reversed, and the cause remanded.

VENDEE UNDER BOND FOR TITLE DOES NOT HOLD ADVERSELY until payment of the purchase price: *Dean v. Brown*, 87 Am. Dec. 555; *Walton v. Hargroves*, 97 Id. 429.

POSSESSION OF PART OF TRACT UNDER A CLAIM OF THE WHOLE, by one having a deed to the whole, no other party being in possession, extends to the bounds of the deed: *Russell v. Harris*, 99 Am. Dec. 421, and note.

DEFENDANT MAY SET UP EQUITABLE TITLE IN EJECTMENT under the codes: See *Morrison v. Wilson*, 73 Am. Dec. 593; *Shawhan v. Long*, 96 Id. 164.

NO PROOF OF EXECUTION OF INSTRUMENT THIRTY YEARS OLD IS REQUIRED: See *Settle v. Alison*, 52 Am. Dec. 393; *Beverly v. Burke*, 54 Id. 351.

ALABAMA GREAT SOUTHERN R. R. Co. v. SOUTH
AND NORTH ALABAMA R. R. Co.

[84 ALABAMA, 570.]

AGENT — WRITTEN AUTHORITY, WHEN NECESSARY. — Under Alabama statute of frauds (Code of 1876, sec. 2145), no legal title to lands will pass by or under a contract made with an agent, unless the agent has “a written authority.”

ESTOPPEL. — NOTWITHSTANDING REQUIREMENTS OF STATUTE OF FRAUDS, declaring void certain contracts for the sale of land unless evidenced by writing, and subscribed by the party to be charged, yet an equitable interest may be acquired in lands, without any written transfer of title, by conduct or declarations of the owner which would create an estoppel *in pais* on his part; and this rule applies as well to corporations as to natural persons.

ALTHOUGH AGENT OF CORPORATION CAN CONVEY NO LEGAL TITLE TO LAND unless his authority is in writing, yet the directors or governing body may so act as to estop themselves from denying the existence of such written authority, and thus create an equitable estoppel *in pais*; as, where the agent acted openly and notoriously, and the corporation for a long time acquiesced in his acts.

IT IS SOUND RULE OF EQUITY, SUPPORTED BY PRINCIPLES OF JUSTICE as well as of public policy, that if the owner of land knowingly suffers another to purchase and spend money on it, under circumstances inducing an erroneous opinion or mistaken belief of title, without making known his own claim, he will not afterwards be permitted to assert in equity any right or title against the purchaser.

DEGREE PRO CONFESSO RENDERED AGAINST CORPORATION, on issues growing out of a contract made by its agents, involves an admission by the corporation of the allegations of the bill as to the validity of the contract, and of the authority of its agents to make it; and the record would be admissible evidence of these matters in a subsequent suit between the parties or their privies.

CONTRACT — CONSIDERATION. — TRIPARTITE AGREEMENT BETWEEN LAND COMPANY AND TWO RAILROAD COMPANIES, whereby the land company sells and conveys land to the latter, for the purpose of building and using thereon their depots, machine-shops, and tracks, and one of the railroad companies surrenders its right to a certain crossing previously selected, to cross elsewhere in a manner beneficial to the other company, and detrimental to itself, is supported by sufficient legal consideration.

UNCERTAINTY IN. — WHERE CONTRACT BETWEEN TWO RAILROAD COMPANIES provides that one company shall have the free use of the right of way of the other company, “in a manner to be hereafter determined by deed,” but no deed is ever executed, the uncertainty of the contract, if objectionable, is to be deemed waived by the conduct of the parties, the one being placed in possession of the right of way, and the other acquiescing therein without objection for over nine consecutive years. This is an identification of the thing contracted for, so far as qualified by its mode of use, not by declarations, but by the acts of the parties, which can be proved by parol evidence.

CONSTRUCTION. — CONTRACT BETWEEN TWO RAILROAD COMPANIES, whereby one stipulates that the other shall have "the perpetual and free use of the right of way," within a distance specified, where the track of one company crosses the other, confers the use of the right of way free from pecuniary compensation, and not merely uninterrupted use.

RAILROAD COMPANY — CROSSING. — Alabama statute (Rev. Code, 1867, secs. 1417-1439), authorizing and regulating indorsement of railroad bonds by the state, and securing to the state its priority of lien, makes a reservation of the right of way for crossing and union purposes: *Id.*, sec. 1435; and this provision is an implied stipulation in every mortgage executed under the law, and is as binding on all parties concerned as if it had been specially incorporated in the contract.

PROVISION OF ALABAMA REV. CODE, SEC. 1435, THAT RAILROAD COMPANIES "may construct their roads so as to cross each other, if necessary," does not limit the right of crossing to an intersection at right angles. It would be a strict and unreasonable construction to hold that no discretion should be allowed in regulating such an arrangement, since the power to do an act means the power to do it in a mode that is just, reasonable, and satisfactory, taking into consideration the peculiar circumstances of each case.

BILL in equity. In 1881, the Alabama Great Southern Railroad Company brought a statutory action of ejectment against the South and North Alabama Railroad Company, to recover a strip of land extending through the city of Birmingham, being part of its right of way. This bill was filed to enjoin that action, and to obtain specific performance of the contract set out below. The South and North Alabama Railroad Company had graded and built its road, prior to 1871, to the vicinity of the present site of the city of Birmingham, which was then an old field, through which the Alabama and Chattanooga Railroad Company had already acquired a strip of land for right of way, and built its track thereon. In 1868, the latter company executed and delivered to one Adams and others a mortgage or deed of trust, covering its entire property, real, personal, or mixed, which it then owned or might thereafter acquire, for the purpose of securing certain bonds which were afterwards, and before the happening of the events which form the foundation of this suit, issued and sold. The contract above referred to was made April 21, 1871, by and between the Elyton Land Company, party of the first part, the Alabama and Chattanooga Railroad Company, party of the second part, and the South and North Alabama Railroad Company, party of the third part, as follows: "Witnesseth, that for and in consideration of the payment to the party of the first part of the sum of one dollar, by the parties of second and third parts, receipt whereof is hereby acknowledged, and for the further

consideration of their doing and performing the presents as hereinafter stipulated and stated, the said party of the first part has this day bargained, sold, and conveyed, and by these presents do bargain, sell, and convey, unto the parties of the second and third parts, jointly and severally, the following described tracts or parcels of land [giving description]; all for the purpose and upon condition that they build, construct, and use thereon their depots, machine-shops, and tracks, for the use of themselves at said city of Birmingham, and upon the further condition that they shall give, grant, sell, and convey unto the two first railroad corporations who construct their railroads through from their terminus to said city, an equal and sufficient quantity of the above granted premises, not exceeding one quarter to each, for their depots, tracks, and machine-shops, and other railroad purposes; and upon the further condition that a portion of said premises, near the center of the tracks, and not less than 415 by 900 feet, be appropriated and used forever as a general passenger depot for each and every railroad ending in the city of Birmingham, with right of way to the same; and upon further condition that the party of the third part shall have the perpetual and free use of the right of way of the party of the second part, in a manner hereafter to be described by deed; and that the strip of thirty-five feet lying between the right of way of the party of the second part on each side of said railroad, etc., shall be held by the party of the first part forever as a perpetual right of way for all railroad companies doing business in and through said city as aforesaid." This paper was attested by witnesses, and signed as stated in the opinion. Soon afterwards, the South and North Alabama Railroad Company built its tracks through the city of Birmingham, the tracks being located on a portion of the right of way of the Alabama and Chattanooga Railroad Company. In May, 1872, said Adams and others, trustees of the mortgage before mentioned, filed a bill to foreclose that mortgage, as the Alabama and Chattanooga Railroad Company had failed to pay the interest therein provided for, and such proceedings were had thereon, that, in 1877, the property covered by the mortgage was sold to one Swann, who conveyed it to the Alabama Great Southern Railroad Company, the appellant. Other facts requisite to an understanding of the case appear in the opinion. In his final decree the chancellor granted the complainant, the South and North Alabama Railroad Company, the relief prayed, but further decreed that the

complainant pay compensation to the Alabama Great Southern Railroad Company for said right of way, to be estimated by the value thereof at the time of its appropriation, and for any injury caused by the complainant's occupancy of said right of way, to the contiguous lands of defendant.

Hoadley, Johnson, and Colston, and Troy, Tompkins, and London, for the appellant.

Thomas G. Jones, contra.

SOMERVILLE, J. The contract of April 21, 1871, purporting to have been executed between the Elyton Land Company, the Alabama and Chattanooga Railroad Company, and the South and North Alabama Railroad Company, has an important bearing on the issues in this cause, and we therefore first consider the objections urged by the appellant in opposition to its validity.

It is urged, in the first place, that this contract was executed by certain officers of the Alabama and Chattanooga Railroad Company without the written authority of that company, and was never afterwards ratified by its board of directors or other governing body. These officers were R. C. McCalla, chief engineer, and John C. Stanton, general superintendent of the road. The contract concerns the use of the right of way of a railroad company, which is an interest in lands, and an agent who conveys such property is required by our statute of frauds to have "a written authority": Code 1876, sec. 2145. If the legal title were in controversy, it is evident that the best and only evidence of such agent's authority to convey would be a resolution of the board of directors, appearing among the corporate proceedings or minutes, showing the appointment of such agent, and investing him with the requisite authority to convey: *Standifer v. Swann*, 78 Ala. 88. But such, as we shall see, is not this case, it being admitted by the appellee that the appellant has the legal title to the right of way in controversy, and that the claim of the appellee cannot rise to a higher dignity than a perfect equity.

There are, in our opinion, two sufficient answers to the argument that neither Stanton nor McCalla is shown to have been invested with a written authority to convey the property in controversy. The first is found in the legal effect of the decree rendered in favor of the Elyton Land Company in August, 1881, against the appellant and the appellee, involv-

ing this same contract. The bill filed in that suit alleged in substance the existence of this contract, and its execution by authority of the Alabama and Chattanooga Railroad Company, and sought to have the benefits of it revoked as against the appellant, the Alabama Great Southern Railroad Company, for non-performance of certain conditions subsequent, the latter company being averred to claim under this contract as the successors of the former. The decree *pro confesso* taken in that case against the appellant involved an admission by it of the allegations of the bill: Code 1876, sec. 3824. The record would be admissible evidence even in favor of a stranger, as a solemn admission by the appellant of the existence of the contract, of the fact of its claiming under the provisions of it, and of the authority of the officers by whom it was executed: 1 Greenl. Ev., sec. 527 a. *A fortiori* would it be admissible in favor of the appellee who was a party to the record as a co-defendant in the suit.

A further and equally cogent reason is found in the principle of equitable estoppel, or estoppel *in pais*, which, we think, arises out of the facts of this case. The case of *Standifer v. Swann*, 78 Ala. 88, relied on by appellant's counsel, does not go further than to hold that no legal title would pass, under the facts of that case, by the deed of Stanton, whatever equities the vendee might have, which were not considered: *Ware v. Swann*, 79 Id. 333; *Swann v. Miller*, 82 Id. 530. The contrary doctrine is well settled in this state, that notwithstanding the requirements of the statute of frauds, declaring void certain contracts for the sale of land unless evidenced by writing subscribed by the party to be charged, an equitable interest may be acquired in lands without any written transfer of title, by conduct or declaration of the owner which would create an estoppel *in pais* on his part: *Hendricks v. Kelly*, 64 Ala. 388; 57 Id. 193; *McPherson v. Walters*, 16 Id. 714; 50 Am. Dec. 200. This rule applies as well to corporations as to natural persons. The fact that they must necessarily act through the instrumentality of agents, either immediate or intermediate, and can act in no other way, does not change the principle. And although an agent of a railroad or other corporation, authorized to sell land or any interest in land, can convey no legal title or freehold estate unless his authority to sell be in writing, this being a question of actual authority, yet the directors or governing body may so act as to estop themselves from denying the existence of such written au-

thority, and thus create an equitable estoppel *in pais*: 1 Rorer on Railroads, 652-665; *Vicksburg & M. R. R. Co. v. Ragsdale*, 54 Miss. 200.

The general rule is, that agents of a corporation, except for the sale or alienation of land, need not be appointed by a vote of the directors, or in writing. Nor need such appointment usually be evidenced by the corporate proceedings or minutes. Both the fact of the appointment and the authority of the agent may be inferred from his being held out to the public as apparently invested with such authority, or from the subsequent recognition or confirmation of his acts, whether originally authorized or not: 1 Wood's Railway Law, pp. 444-447, sec. 163; *Alabama etc. R. R. Co. v. Kidd*, 29 Ala. 221; Angell and Ames on Corporations, sec. 284. If the act done by the agent be one of so public and notorious a character as that ignorance of it would be gross negligence on the part of the principal, the inference is the stronger that it must have been known to the principal, and that his failure to expressly dissent in a reasonable time is a ratification of the act, especially where the principal derives a benefit from it.

The testimony shows that John C. Stanton was the general superintendent of the Alabama and Chattanooga Railroad Company, and that R. C. McCalla was its chief engineer. The contract in question was signed by them both. Its purpose was to provide for depot facilities and locations for machine-shops, with rights of way through a space agreed on for the crossing of two great and important railways,—the site of a future prosperous city; and to secure to one of the roads, then in progress of construction, a suitable and convenient place of crossing. It is shown that Stanton had been intrusted with full power to build the road, equip, manage, and run it, as its general superintendent, exercising authority over all intermediate agents. There was no other person representing the company who had any authority of a cognate character. He was exercising this power so notoriously and openly that it would be gross negligence for the directors to be ignorant of his conduct. The presumption is, that they knew what he was doing incident to the customary duties of his position. It may be regarded as matter of common knowledge that such powers are usually exercised by such officers, as necessary to the continued life and existence of the company: 1 Wood's Railway Law, pp. 439, 440, sec. 162. The failure of the company, moreover, to object to the open and notorious occupancy of the right

of way for nearly nine years, under the terms of the contract, is persuasive to show the conferring of original authority, or else the ratification of the act of their agent in making it. The existence of this authority is also corroborated, if it is not, as we have above said, established solely by the decree *pro confesso* in favor of the Elyton Land Company, rendered against appellants on issues growing out of this same written agreement.

The inference thus being that this authority was conferred, although it may have been oral, and its exercise being so long acquiesced in, and the appellee, the South and North Alabama Railroad Company, having, as it appears, located its machine-shops, tracks, and depots, with a view to the right of way acquired under this contract, and the land in controversy, as so occupied by it, having risen in value perhaps a hundred-fold, it would be inequitable and unconscientious to allow these affirmations of the agent's authority now to be denied or disproved. It is a sound and honest rule of equity, supported by principles of justice as well as of public policy, that if one knowingly though passively suffers another to purchase and spend money on land, under circumstances which induce an erroneous opinion or mistaken belief of title, without making known his claim, he shall not afterwards, in a court of conscience at least, be permitted to successfully assert any right or title against the purchaser: *Hatch v. Kimball*, 16 Me. 146; *Marshall v. Pierce*, 12 N. H. 136; *Wendell v. Van Renssalaer*, 1 Johns. Ch. 354; *Blake v. Davis*, 20 Ohio, 231. The facts of this case, it seems to us, fall within this rule, and if they do not constitute an estoppel *in pais*, the whole doctrine might as well be blotted from our system of jurisprudence.

It is further urged that the contract in question is not supported by any sufficient legal consideration. The agreement is tripartite, between the Elyton Land Company and the two railroad companies. The rights conferred by the land company upon the appellant, and the abandonment by the appellee of another crossing which had been determined on, would be a sufficient consideration, the first being beneficial to the appellant, and the latter being detrimental to the appellee.

The uncertainty of the contract is also urged as a reason why it shall not be enforced. This feature is supposed to be found in the provision that "the party of the third part shall have the perpetual and free use of the right of way of the party of the second part in a manner to be hereafter deter-

mined by deed." This, it is said, left open for future adjustment one or more important terms of the contract; and no such deed has ever been executed. The appellee was, however, placed in possession of the right of way of appellant, and has continued in its daily use for over nine consecutive years, with the knowledge of the appellant and those under whom it derives title. The conduct of the parties, and uniform usage thus acquiesced in, has supplemented this alleged uncertainty. The failure on the part of the Alabama and Chattanooga Railroad Company to require a deed of the character stipulated for, followed by a dissolution of that corporation, and the acquiescence for so long a time in the mode of use adopted by the appellee, must be deemed a waiver of this feature of the contract, as well as an agreed interpretation of it. This is an indention of the thing contracted for, so far as qualified by its mode of use, not by declarations, but by the acts of the parties, which can be proved by parol evidence. In fact, it is both a construction and an execution of the contract as to the only clause of it open to the charge of uncertainty.

The last objection relied on is the fact that the appellant claims title under a mortgage or deed of trust executed by the Alabama and Chattanooga Railroad Company to the state, in December, 1868, several years prior in point of time to the contract in question, which was not made until April, 1871, and that for this reason its title is paramount to that of the appellee. The argument is, that the railroad, being a mortgagor in possession, could make no contract disposing of any portion of its right of way, which was subject to the encumbrance of the mortgage. This may be admitted to be the ordinary rule governing the rights of the mortgagor and mortgagee of property, whether real or personal. Being the owner of the equity of redemption only, the exceptions are rare in which the mortgagor can confer on another any greater rights than those which he possesses. Nor usually would the silence of the mortgagee, in standing by and permitting a purchaser from the mortgagor, having notice of the mortgage, to put valuable improvements on the property, estop him from asserting his prior claim under the mortgage. Without deciding this point, we may hypothetically admit its correctness: 1 Jones on Mortgages, sec. 681; *Steele v. Adams*, 21 Ala. 534; *Booraem v. Wood*, 27 N. J. Eq. 371; *Frost v. Beekman*, 1 Johns. Ch. 288.

But the proposition urged by the appellee as an answer to this is, that the right of the two railroads to make the crossing, and therefore to appropriate to such purpose a reasonably convenient portion of each other's right of way, is paramount to the mortgage, or any other lien under which appellant claims. This mortgage or deed of trust was executed in the year 1868, and the bonds secured by it were issued under the provisions of the act of February 19, 1867, incorporated in the Revised Code of 1867 as sections 1417 to 1439, inclusive, authorizing the indorsement by the governor, in the name of the state, of the first-mortgage bonds of certain railroads. The making of such indorsement secured to the state a first lien upon the road, with all its property and equipments, including its right of way: Rev. Code 1867, sec. 1624. It is under a foreclosure of this lien, as well as of the mortgage executed to certain trustees to secure these bonds, that the appellant claims title.

The inquiry is, Did the law, which authorized this indorsement and secured this lien, make a reservation of the right of way for crossing and union purposes, such as would cover the present case? It is contended that section 1435 of the Revised Code, which constituted a portion of that law, accomplishes this end. That section, so far as germane to this inquiry, reads as follows:—

“The railroad companies receiving the benefits of this article, and all other railroad companies incorporated in this state, may construct their roads so as to cross each other, if necessary, by the main track or branches, or unite with each other or the branches of each”: Rev. Code, sec. 1435.

This provision, being in the law which authorized the indorsement of the bonds, was a part of the contract of indorsement, and the acceptance of the benefits of the law by the railroad company made it as binding on all parties concerned as if it had been specially incorporated in the contract. And all persons dealing with the bonds were charged with notice of the law under which they were issued: *Morton v. New Orleans etc. R'y Co.*, 79 Ala. 590. The company thus, by consent of the state, of the bond-holders and mortgagees, excepted from any lien or conveyance so much of its right of way as was necessary and convenient to make a crossing or union with the South and North Alabama railroad, or any other railroad in Alabama, and dedicated it to the use designated by the statute. This provision was a wise and necessary one,

in view of the fact that, without its incorporation in the statute, it would have been practically impossible for the managers of railroads encumbered by mortgages ever to have made any contract for crossing which would have been binding on bond-holders, many of whom would be unknown, and others subject to the disabilities of coverture, infancy, or of being *non compos*, so that they could not bind themselves. The details of such an arrangement were necessarily devolved by implication upon the managing authorities of each road, subject only to the limitation that it should be made in a *bona fide* and reasonable exercise of the authority conferred. To this, every one concerned must be conclusively held to have assented.

The record presents nothing which justifies the conclusion that the right of way granted to the appellee was not of this character. The contention of the appellant, that the statute limited the right of crossing to a perpendicular crossing, and not to one in any degree longitudinal, cannot, in our judgment, be sustained. The statute must have intended to require imperatively a crossing at right angles, or else it permits one intersecting at an acute angle. It would be a strict and unreasonable construction to hold that no discretion should be allowed in regulating such an arrangement. Nor can any rule be stated by which to determine the exact size of the angle. We might well say that in an open plain, where no marsh, river, mountain, or declivity intervened, that an intersection at such an angle as to occupy ten miles of track would be unreasonable, while the occupancy of a few hundred yards might not be. The argument is manifestly unsound that places on the same basis these two categories. The power to do an act means the power to do it in a mode that is just, reasonable, and satisfactory, taking into consideration the peculiar circumstances of each case. It is here shown that about four thousand feet—less than a mile—of the appellant's track was appropriated for the purpose of a crossing of the two railroads. The circumstances of the case were peculiar. It was no ordinary crossing. It was reasonably contemplated that the site would be occupied by a large and prosperous city in the future, a plat of which, with its appropriate streets, avenues, and dedication to public uses had already been surveyed and mapped out. It was reasonable to expect that such a city would embrace within its limits this mile of highway. It would be convenient to the public, as well as mutually to both roads, to

have the tracks adjacent for this particular distance. It would lessen the frequency and hazard of crossing the track with vehicles of all kinds, and would greatly facilitate the interchange of both freight and passenger cars passing from one road to the other in the process of transportation, especially when accomplished by protracted switching, so often necessary in such cases, and growing more dangerous with the daily increasing density of a growing city's population. These reasons satisfy us that the contract of April 21, 1871, under which the appellee is shown to have occupied the four thousand feet of the right of way of the Alabama and Chattanooga Railroad Company, was authorized by law, and was binding on all persons concerned, including the appellant. Section 1424 of the Revised Code, 1867, which confers the priority of lien on the state, does not conflict with the foregoing views in the least. The section under discussion (section 1435) excepts from the operation of this lien, as we have said, so much of the right of way as may be necessary or proper for a crossing with other roads. The case of *Illinois Central R. R. Co. v. Chicago etc. R. R. Co.*, 122 Ill. 473, but recently decided by the supreme court of Illinois, is, in our opinion, perfectly reconcilable with these views. It was there held that, under the facts of that case, one railroad had no authority, in exercising the right of crossing, to condemn under the statute a crossing which had appropriated ten miles of another's railroad track, which had already been condemned as a public highway. That conclusion was probably correct, although two of the judges dissented: *Anniston & C. R. R. Co. v. Jacksonville etc. R. R. Co.*, 82 Ala. 297.

That the contract in question conferred the use of the right of way free from future pecuniary compensation, seems to us quite clear. The right conferred is the "perpetual and free use of the right of way" in question. The consideration for this grant was given both by the Elyton Land Company and the appellee, as we have heretofore shown. Its use by the appellee was of great advantage to the other road. The word "free" must here be construed to mean free of compensation, not merely uninterrupted use, as insisted by appellant's counsel. This construction is corroborated by the fact that no compensation was ever claimed for such use until the bringing of the action of ejectment sought to be enjoined by the present bill,—a period of more than nine years from the making of the contract.

It results from the foregoing views that there is no error in the decree of the chancellor of which appellant can complain. The compensation required by the decree to be paid for the land, if erroneous, was error without injury.

The decree is affirmed.

ONE WHO STANDS BY AND SUFFERS ANOTHER TO PURCHASE and spend money on his land under an erroneous opinion of title cannot afterwards assert his legal right against such person: *Bryan v. Ramirez*, 68 Am. Dec. 340; *Workman v. Guthrie*, 72 Id. 654; *Goodin v. Cincinnati etc. Co.*, 98 Id. 95, and notes.

AUTHORITY TO EXECUTE INSTRUMENT IN WRITING MUST BE IN WRITING: *Reed v. Van Ostrand*, 19 Am. Dec. 529; *Blood v. Goodrich*, 21 Id. 121.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

BARKLY v. COPELAND.

[74 CALIFORNIA, 1.]

DEFENDANT IN ACTION FOR SLANDER MAY NOT SHOW IN MITIGATION circumstances not known to him when he spoke the words complained of.

EVIDENCE. — PRIOR STATEMENTS MADE BY A WITNESS MAY BE RECEIVED IN EVIDENCE when the adverse party has sought to impeach him by showing that he was testifying under some motive, and that his account is a fabrication of a late date, if such prior statements were made before the motive imputed to him could have existed.

RECEIVING EVIDENCE IN SUPPORT OF WITNESS BEFORE ANY IS OFFERED TO IMPEACH HIM will not justify the granting of a new trial, if evidence is subsequently offered and received for the purpose of such impeachment.

EVIDENCE OF OTHER CRIME. — IN ACTION FOR SLANDERING plaintiff by charging him with stealing the cattle of P., a witness may be permitted to detail a conversation between him and plaintiff, in which the latter made an effort to induce the former to steal the cattle of D., if the witness states that there was a general understanding between him and plaintiff, under which he was to steal cattle and drive them to plaintiff to be butchered for their joint benefit.

DECLARATIONS OF AN AGENT ARE ADMISSIBLE AGAINST HIS PRINCIPAL if the latter has designated the former as a person who could be trusted, and through whom reports would be made, and the declarations are part of a report made by him.

EVIDENCE OF THE WEALTH OF DEFENDANT IS ADMISSIBLE IN ACTION AGAINST HIM FOR SLANDER, to show the extent of the injury suffered from his defamatory words, and when punitive damages are allowed, to graduate the punishment.

ACTION for slander in charging the plaintiff with being in-
terested with one Russell Speegle in stealing the cattle of

Thomas Polk, and with receiving such cattle from Speegle knowing them to have been stolen. Verdict for one dollar. Plaintiff appealed.

Jackson Hatch and Clay W. Taylor, for the appellant.

Chipman and Garter, J. F. Ellison, and L. V. Hitchcock, for the respondent.

THORNTON, J. Action to recover damages for slanderous words spoken by defendant of plaintiff.

The plaintiff recovered a verdict of one dollar damages. He then moved for a new trial, which was denied, and from the judgment and the above order plaintiff appealed.

In regard to the motion of plaintiff to strike out certain portions of defendant's answer, to which our attention is first called, we will remark that only such mitigating circumstances as were within the knowledge of the defendant when he spoke the words complained of can be alleged in the answer: See *Willover v. Hill*, 72 N. Y. 36; *Hatfield v. Lasher*, 81 Id. 249. But as the jury were instructed as to such circumstances in accordance with the above, the error of the court below in refusing to strike out that portion of the answer which set forth the circumstances of mitigation not known to the defendant when he uttered the words counted on worked no injury to the plaintiff.

The defendant offered in evidence the deposition of Russell Speegle, who had been convicted of stealing the cattle of Thomas Polk, in relation to which theft the disparaging words uttered by the defendant had been spoken. Speegle testified to statements made by him to several persons in regard to the theft of the cattle. The statements or declarations were made to Laura Moore, David Burke, Pope, Costello, Mitchell, and I. Speegle, and were testified to by all of the last named except Laura Moore, who does not appear to have been called. They tend to corroborate his testimony in regard to the connection of the plaintiff with the stealing of the cattle, by showing that about or not long after his (Speegle's) arrest for the larceny of the cattle, he made statements in regard to it similar to those which he made in his testimony.

The statement to Laura Moore was made shortly before the cattle were taken to the plaintiff. The statements made to the other witnesses were made after his arrest.

The statements were allowed to go to the jury against the

objection and exception of plaintiff, and before any evidence impeaching the witness Speegle had been introduced.

It has been held in this state that where an attempt has been made to impeach a witness by proving former contradictory statements, he cannot be supported by evidence that he has made to other persons declarations consistent with his testimony. This ruling was made in *People v. Doyell*, 48 Cal. 90, 91. But in the same case it was said: "Such declarations may, however, be admissible in contradiction of evidence tending to show that the account is a fabrication of late date, when it may be shown that the same account was given before its ultimate effect and operation (arising from a change of circumstances) could have been foreseen; and also, perhaps, in other peculiar cases": 48 Cal. 91. It has been frequently held that when the witness is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist: See *Gates v. People*, 14 Ill. 438; *Stolp v. Blair*, 68 Id. 543; *State v. Denzin*, 32 Vt. 158; *State v. Vincent*, 24 Iowa, 570; 95 Am. Dec. 753; Wharton on Evidence, sec. 570.

When the evidence objected to was admitted, no evidence impeaching Speegle had been put in.

The declarations of Speegle were offered by defendant in putting in his defense, and the impeaching evidence was offered by plaintiff in rebuttal.

The impeaching evidence consisted of the depositions of three convicts in the state prison, and was to the effect that soon after certain persons representing the defendant had visited the state prison, and had an interview with Speegle; that each of them had had an interview with Speegle, in which he said that Barkly had sued Copeland for damages for saying that he was in with him in stealing cattle; that these representatives of the defendant had told him that if he would swear that Barkly was in with him in stealing the cattle they would get him pardoned right away; that Speegle also stated that Barkly was not in with him, but that if there was any way to get out of prison he was going to do it.

This testimony introduced by plaintiff tended to show that Speegle was testifying at the trial under the influence of a promise to procure his pardon in case he would so testify as to inculcate the plaintiff; that his testimony had been given under the influence of a motive prompting him to make a

false statement. This state of things would undoubtedly bring the case within the rule allowing the prior declarations of like character to be given in evidence to support his testimony, if the impeaching evidence had been offered before the prior statement had been testified to. Is it error for which a judgment of reversal should be here given, because impeaching evidence was not put in before the statements objected to were introduced? There can be no doubt, we think, that if the court had ruled out the prior declarations of Speegle when offered, it would have ruled correctly. But having admitted the declarations before the introduction by plaintiff of the evidence to impeach, we do not think we should pronounce a judgment of reversal, when we find in the record, though subsequently introduced, evidence which would have authorized the admission of the prior declarations or statements if offered before they were testified to.

The evidence of the witness Snelling, detailing a conversation had by him with Russell Speegle, which came in after the impeaching evidence had been put into the case, was of the character of those just above considered, and was admissible on the same grounds.

The testimony of Russell Speegle concerning an effort of plaintiff, made in June, 1884, to get the witness to steal cattle belonging to Dicus, and drive them to him, was admissible. Speegle details this as a part of the general understanding between him and plaintiff, by which the former was to steal cattle, drive them to plaintiff to be butchered, and the proceeds to be shared between them. We think this evidence was admissible to show the relations and transactions between the witness and the plaintiff as bearing on the question of the stealing of Polk's cattle, and to sustain defendant's plea of justification.

There was no error in admitting the declarations of N. Barkly, plaintiff's driver, to R. Speegle. There was evidence tending to show that the plaintiff had told Speegle (who testified to these declarations) that he could trust this driver, and that plaintiff would report through him to Speegle. The tendency of the above was to show that this driver was to be the medium of communication between Speegle and the plaintiff. The declarations objected to appear to have been made in a report to Speegle of the condition of the cattle stolen by him and turned over to the plaintiff. The above was evi-

dence of such a relation between Barkly and the driver as rendered his declarations admissible.

Plaintiff offered to prove by defendant that in June, 1885, and at the time of the utterance of the language admitted by him in his answer, he was worth, at least in property, one hundred thousand dollars. The offer was disallowed, and there was exception by plaintiff.

In actions of slander and libel, such evidence has been held admissible in many of the states. We cite the following cases: *Brown v. Barnes*, 39 Mich. 211; 33 Am. Rep. 335; *Hayner v. Cowden*, 27 Ohio St. 292; 22 Am. Rep. 303; *Bennett v. Hyde*, 6 Conn. 24; *Buckley v. Knapp*, 48 Mo. 153; *Hosley v. Brooks*, 20 Ill. 115; 71 Am. Dec. 252; *Humphries v. Parker*, 52 Me. 502; *Karney v. Paisley*, 13 Iowa, 89; *Adcock v. Marsh*, 8 Ind. 360; *Lewis v. Chapman*, 19 Barb. 252; see also 1 Sutherland on Damages, 743, 745.

Such evidence is admitted on the ground that defendant's wealth is an element in his social rank and influence, and therefore tends to show the extent of the injury suffered from defendant's words: *Buckley v. Knapp*, 48 Mo. 163; *Bennett v. Hyde*, 6 Conn. 24-27; *Lewis v. Chapman*, 19 Barb. 252; and where punitive or exemplary damages are allowed, the evidence is admitted by which to graduate the punishment: *Bennett v. Hyde*, *supra*. In this case, if the jury had rejected the evidence of the mitigating circumstances, it might have found punitive or exemplary damages.

We are of opinion the court erred in rejecting the offer of plaintiff to introduce the testimony as to defendant's wealth.

The court committed no error in excluding the testimony of Clark concerning a conversation had with Speegle the night after the arrest of the latter, as the proper foundation had not been laid for it by calling Speegle's attention to it.

When the plaintiff had closed his case in rebuttal, the court, against the objection and exception of plaintiff, allowed the defendant, who had been present during the entire trial, to be called, and to testify fully as regards his defense.

While this was a most unusual course, and one not to be commended, still we consider it, under the decisions of this court, as within the discretion of the court, and one which, unless such discretion is abused, cannot be reviewed here. As the plaintiff was not inhibited from offering evidence in reply to that of defendant, and in fact did offer some evidence in

reply, we cannot say that there was here such an abuse of discretion as would justify this court in ordering a reversal.

A large number of requests for directions to the jury were asked by both parties. And while some of those asked by plaintiff and refused might well have been given, yet we are of opinion that the instructions as given covered substantially the same points, and fairly presented to the jury the law bearing on the case.

For the error above pointed out, the judgment and order must be reversed, and the cause remanded for a new trial.

ADMISSIBILITY OF STATEMENTS OUT OF COURT IN CORROBORATION: See the note to *Johnson v. Patterson*, 11 Am. Dec. 757-760, where it is said that such statements are not generally admissible before impeachment; and to the same effect, see *State v. Patterson*, 39 Id. 699; but when an intention of impeaching the witness is announced, such statements are admissible: *State v. George*, 49 Id. 392.

EVIDENCE OF CRIME DIFFERENT FROM THAT CHARGED is never admissible except to show motive, interest, or guilty knowledge: *People v. Sharp*, 1 Am. St. Rep. 851; *People v. Greenwall*, 2 Id. 415. A party sued for slander, who denies the charge, cannot, on cross-examination, be asked if he had not slandered another person two or three years before: *Sullivan v. O'Leary*, 146 Mass. 322.

DECLARATIONS OF AGENT MADE WHILE IN THE TRANSACTION OF THE PRINCIPAL'S BUSINESS are admissible against the principal: *Burnside v. Grand Trunk R'y Co.*, 93 Am. Dec. 474.

EVIDENCE OF PECUNIARY CONDITION OF DEFENDANT IS ADMISSIBLE IN ACTION FOR SLANDER, if the evidence warrants the imposition of vindictive damages: *Reeves v. Winn*, 2 Am. St. Rep. 287, and note; and see note to *Brown v. Barnes*, 33 Am. Rep. 377-380; to the same effect are *Reeves v. Winn*, 97 N. C. 246; and *Harman v. Cundiff*, 82 Va. 239.

EX PARTE CAMPBELL.

[74 CALIFORNIA, 20.]

A MUNICIPAL CORPORATION MAY PROHIBIT THE KEEPING THEREIN OF ANY TIPPLING-HOUSE, DRAM-SHOP, OR BAR-ROOM. Such prohibition does not conflict with any provision of the constitution of the state, nor of the United States.

Rearden and Ray, for the petitioner.

Williams and McKinley, and *N. P. Conroy*, for the respondent.

PATERSON, J. The petitioner is before us on a writ of *habeas corpus* to test the validity of an ordinance of the city of Pasadena, duly passed, approved, and published, for a violation of

which he has been duly convicted. The ordinance was passed February 19, 1887, and took effect on the first Monday in May, 1887. The following provisions only are germane to the matter before us:—

“Sec. 1. It shall be and is hereby made unlawful for any person or persons, either as owner, principal, agent, servant, or employee, to establish, open, keep, maintain, or carry on, or assist in carrying on, within the corporate limits of the city of Pasadena, any tippling-house, dram-shop, cellar, saloon, bar, bar-room, sample-room, or other place where spirituous, vinous, malt, or mixed liquors are sold or given away; . . . provided, that the prohibitions of this ordinance shall not apply to the sale of liquors for medicinal purposes by a regularly licensed druggist, upon the prescription of a physician entitled to practice medicine under the laws of the state of California; nor shall such prohibitions apply to the sale of such liquors for chemical or medicinal purposes.”

Violations of the ordinance are declared to be misdemeanors. The complaint under which petitioner was convicted charged that the said Campbell, at the time and place aforesaid (May 3, 1887), did keep and maintain a certain dram-shop, saloon, and bar-room, where spirituous and malt liquors were then sold, said defendant being then and there the owner thereof; that said defendant was not then and there a regularly licensed druggist, and the liquors then and there sold by him were not sold for either chemical or medicinal purposes.

In addition to the facts above stated, counsel for the petitioner and for the people have stipulated,—

“That there has not since the first day of May, 1887, been any ordinance of the city of Pasadena requiring a license to sell vinous, malt, or mixed liquors in any quantity.

“That there was an ordinance of the city of Pasadena requiring a license to retail spirituous, vinous, malt, and mixed liquors, passed in June, 1886, which was in force up to the first day of May, 1887; and the said city issued a license under said ordinance to petitioner to retail and sell spirituous, vinous, malt, and mixed liquors up to the first day of May, 1887; but said ordinance was repealed February 19, 1887, the repeal taking effect May 1, 1887.

“That the petitioner has paid all county and municipal taxes assessed against the spirituous, vinous, malt, and mixed liquors owned, kept, and sold by him in said saloon in said city of Pasadena.”

It is claimed by the petitioner that the ordinance is void because it conflicts with section 13, article 1, of the constitution of this state, which provides that no person shall be deprived of life, liberty, or property without due process of law. It has been held that an act which substantially destroys the property in intoxicating liquors owned and possessed by persons within the state when the act took effect, by preventing the sale, keeping, or giving away of the same, except for medicinal purposes, is violative of this provision of the constitution, and in its application to such liquors is inoperative and void: *Wynehamer v. People*, 13 N. Y. 378; *Bertholf v. O'Reilly*, 74 Id. 516; 30 Am. Rep. 323.

That question, however, is not properly before us in this proceeding. It is not shown by the record when, if ever, the petitioner became the owner of the liquor sold. The last paragraph of the above stipulated facts, as to payment of taxes, was intended, no doubt, to present the question arising out of ownership for an opinion, but the language is so uncertain in its effect that it ought not to be taken as the basis of a decision upon so grave and important a constitutional question. In all inquiries upon matters of this kind, the facts should be full and clear, or the court should refuse to consider the question: *Bartemeyer v. Iowa*, 18 Wall. 129.

The same may be said of the contention that the ordinance is void under section 8, article 1, subdivision 3, of the constitution of the United States, because no distinction is made between imported wines and liquors remaining in the original and unbroken packages, and other wines and liquors; there is nothing to show the character of the liquors sold by the petitioner. Furthermore, the petitioner is charged with keeping a bar-room, and we consider the case only upon that basis. It is further claimed that the ordinance is void, because "under the municipal corporation act, the city of Pasadena was not authorized to pass the ordinance: Stats. 1883, c. 49, sec. 862, subs. 1-10; for if the legislature had intended to confer the power to prohibit the sale of wines and liquors upon cities of the sixth class (of which Pasadena is one), it would have said so in direct terms, as was done in the case of cities of the fourth class."

Prior to the adoption of the constitution of 1879, the local authorities possessed only such powers as were expressly or by necessary implication conferred upon them by their charters. It is now provided that "any county, city, town, or

township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws": Const., art. 11, sec. 11. Under this provision, every county, city, town, or township may adopt and enforce such constitutional police regulations as are not in conflict with general laws. It has the same power over its own local police and sanitary affairs as were formerly granted by the legislature, and unless the exercise thereof will conflict with the operation of general laws, it may make and enforce the same through its local government. That such a law as the one before us is not repugnant to any clause of the constitution of the United States, there can be no doubt. The supreme court of the United States has decided, uniformly, that "the usual ordinary legislation of the states regulating or prohibiting the sale of intoxicating liquors raises no question under the constitution of the United States prior to the fourteenth amendment of that instrument. The right to sell intoxicating liquors is not one of the privileges and immunities of the citizen of the United States, which by that amendment the states were forbidden to abridge": *Bartemeyer v. Iowa*, *supra*; *License Cases*, 5 How. 504; *Beer Co. v. Massachusetts*, 97 U. S. 32. And that the power to license, regulate, or prohibit tippling-houses is a constitutional right, which may be enforced as a police regulation through proper legislation, is no longer an open question in this state. In *Ex parte Smith and Keating*, 38 Cal. 708, it was said: "Legislatures have enacted a variety of laws which undoubtedly, in a general sense, affect the rights of life, liberty, property, safety, and happiness by way of restraint. Of such are laws regulating the slaughter of animals, the interment of the dead, the erection of buildings, in cities and towns, of inflammable material, the manufacture and keeping of gunpowder and other explosive compounds, the vending of poisons and other noxious drugs, the sale of intoxicating beverages to certain classes of persons, as Indians, and even to all classes of persons, as in the case of the prohibitory liquor laws of Maine and Massachusetts": *Ex parte McClain*, 61 Cal. 437; 44 Am. Rep. 554.

Unless we are prepared, therefore, to overrule the decisions of our own state, and disregard the opinions of the supreme court of the United States, we must hold that the ordinance in question is free from objection, so far as its constitutionality is concerned; that it is not violative of any clause of the constitution of the United States; and that it is, in its scope and

operation, within the police powers which may be lawfully enforced under the provisions of the constitution of this state.

There is but one question remaining to be considered: Is the ordinance "in conflict with general laws"? Section 11, article 11, of the constitution, clearly subordinates the powers conferred upon counties, cities, towns, and townships to the general laws of the state. It is claimed that the ordinance before us is in conflict with general laws because "the one prohibits, the other makes full provision for the granting of licenses for, the sale of spirituous, vinous, and malt liquors." In support of this contention, counsel cites sections 3356, 3381, 3382, 4045, and 4408 of the Political Code, and subdivision 33, section 25, of the county government act, Statutes of 1883, page 303. The provisions of the Political Code referred to are unconstitutional, and no longer operative. This was decided in *People v. Martin*, 60 Cal. 156, where it is said that "the taking of the power to impose such taxes [licenses] from the legislature, and vesting it in the local authorities, is but another of the many evidences to be found in the new constitution of the intention to bring matters of a local concern home to the people." Those sections of the code, therefore, stand annulled by the constitution. Section 25 of the county government act confers upon the boards of supervisors in their respective counties power to make and enforce "all such local police, sanitary, and other regulations as are not in conflict with general laws." There is nothing in the case before us to show whether the board of supervisors of Los Angeles County have ever made any regulations with respect to the sale of wines or liquors in saloons and bar-rooms, but manifestly such regulations, if made, could not operate to divest the authorities of the city of the right to legislate upon the same subject, and enforce such regulations within the city limits. The regulations of the board of supervisors would not be a general law within the meaning of the provisions of section 11, article 11, of the constitution.

Our attention has not been called to any general law from which an intention on the part of the legislature to prohibit such ordinances as the one before us—local police regulations in cities—can be inferred. It is true, as claimed by the petitioner, the legislature has by many acts manifested the policy of encouraging the growth of the grape and the manufacture of wines and brandies by our people, and has considered the liquor traffic heretofore as a legitimate source

of revenue; but no act now in force and effect is by its express terms or by implication a limitation upon the powers of the municipalities of the state to regulate or prohibit the sale of intoxicating liquors in bar-rooms. The legislature has prohibited the sale of liquors to minors, and in the lobbies of theaters, near camp-meetings, and in and about certain public buildings and institutions of learning. It has also repealed what was known as the Sunday law; and by an act recently passed, has made it unlawful to sell, or offer to sell, under the name of wine, or under any name designating pure wines, any substance or compound, except pure wine, or pure grape must, as defined in the act; and has appropriated a large sum of money for the use of the state board of viticulture. All these are indicative of a policy to regulate.

There is nothing in these acts inconsistent with the constitutional authority vested in the municipalities to make and enforce such local regulations respecting saloons, etc., as may be deemed best by the local legislative bodies. Section 11 of article 11 is itself a charter for each county, city, town, and township in the state, so far as its local regulations are concerned; and nothing less than a positive and general law upon the same subject can be said to create a conflict within the meaning of that section: *Ex parte Ah Toy*, 57 Cal. 92.

There is nothing in this case which requires us to determine any other question than the right of the city to prevent tippling-houses, dram-shops, and bar-rooms,—a question entirely different from that sought to be raised by petitioner, arising out of the ownership and manufacture of wines, etc.

Not only is there nothing in the provisions of the ordinance before us inconsistent with general laws, but its provisions are in harmony with the authority expressly vested in cities of the sixth class by section 862 of the municipal corporation act of March 13, 1883, which provides that the board of trustees shall have power “to pass all ordinances not in conflict with the constitution and laws of this state or of the United States.” This act of March 13, 1883, is in harmony with, and passed in obedience to, the provisions of section 6, article 11, of the constitution.

In cases of this kind, we have nothing to do with the policy of the law. That is a matter for the legislature. In determining the question whether there is a conflict, we look only at the law itself, which is the best and only evidence of the policy of the state on the question before us.

The petitioner is remanded to custody.

McFARLAND, J., dissented from the opinion of the majority, on the ground that the clear purpose of the ordinance in question "was practically to destroy the ownership of certain commodities which in other parts of the state are recognized and dealt with as property as fully as is flour, or bacon, or sugar. One of them—wine—is the product of a leading industry. It provides that these commodities shall not be sold or given away at any place within the bounds of the municipality. The power to sell or dispose of property gives to it its main valuable quality; and to take away this quality is to substantially confiscate it." He insisted that the ordinance was void, because in conflict with the general laws of the state, in this, that these laws recognized property in wines and liquors, and encouraged their manufacture and sale, while the ordinance interfered with such right of property, and made such sale wellnigh impossible within the territorial limits of the municipality.

MUNICIPAL CORPORATION MAY PROHIBIT THE SALE OF INTOXICATING LIQUORS: *Pekin v. Smelzel*, 74 Am. Dec. 522, and note.

IN RE LOWENTHAL.

[74 CALIFORNIA, 109.]

IT IS A CONTEMPT OF COURT TO OBSTRUCT AND TAKE FROM A POLICE OFFICER, UNDER LEGAL PROCESS, PERSONAL PROPERTY TAKEN BY HIM UNDER A SEARCH-WARRANT issued by the presiding judge of such court, for the purpose of securing certain documents alleged to have been used in committing a felony.

HABEAS CORPUS.

P. F. Dunne, for the petitioner.

M. I. Sullivan and Joseph Kirk, for the respondent.

The COURT. The petitioner was fined and committed to the county jail for a term of five days for a contempt of the process of the superior court, department 9, in and for the city and county of San Francisco.

The alleged contempt of petitioner consisted in obstructing and taking from a police officer, by means of legal process, certain personal property taken by such officer under a search-warrant issued by J. V. Coffey, presiding judge of said superior court, for the purpose of securing certain documents and papers averred to have been used as a means of committing a felony.

Petitioner had a hearing before the superior court, and upon the testimony *pro* and *con*, was found guilty and sentenced, as hereinbefore stated.

We have examined the record with some care, and are of

opinion the superior court had jurisdiction of the subject-matter and of the person of the petitioner, and that the judgment rendered was such as, upon the showing made, the court was authorized to make.

The increasing volume of business brought before this court under the original jurisdiction conferred upon it, and the time necessarily consumed thereby, to the exclusion of other and equally important business, prompts us to brevity of opinion in cases where, like the present, our jurisdiction is not appellate.

These are some of the considerations which restrain us in the present case from arguing *in extenso* from the premises up to the conclusions we have reached.

The petitioner is remanded to the custody of the sheriff.

SAN FRANCISCO v. LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

[74 CALIFORNIA, 113.]

FOREIGN CORPORATIONS ARE ENTITLED TO THE PROTECTION OF STATE LAWS as fully as citizens, if permitted to do business in the state; and if the statutes of a state permit foreign corporations to do business therein, but impose on them conditions which could not be imposed on citizens, the permit is valid while the condition is void.

STATE CANNOT LEVY A TAX ON FOREIGN CORPORATIONS DOING BUSINESS THEREIN, if its constitution prohibits it from levying a like tax on its inhabitants.

WHAT IS A TAX. — If a statute requires every agent of a foreign insurance company doing business in this state to pay into the treasury of the county a sum equal to one per centum of the amount of all premiums paid or agreed to be paid to such agent for insurance effected by him within such county, the money when paid to constitute a fund to be known as the firemen's relief fund of such county, such exaction is a tax, and, as such, is forbidden by section 12 of article 11 of the constitution of California, declaring that the legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes.

A LICENSE PROPER IS A PERMIT to do business which could not lawfully be done without such license.

FOREIGN CORPORATION DOES NOT WAIVE THE UNCONSTITUTIONALITY OF A STATUTE BY CONTINUING AFTER ITS PASSAGE to do business in the state. If the conditions imposed by the statute are void, no implied assent thereto can be presumed.

THE IMPOSITION OF A TAX FORBIDDEN BY THE CONSTITUTION CANNOT BE SUPPORTED AS AN EXERCISE OF THE POLICE POWER OF THE STATE.

E. W. McGraw and A. L. Hart, for the appellants.

Stanly, Stoney, and Hayes, John Garber, George Flournoy, Jr., D. M. Delmas, D. E. Alexander, and Isaac Joseph, for the respondents.

TEMPLE, J. This action was brought to recover \$441.36, with interest, under an act of the legislature, entitled "An act to require the payment of certain premiums to counties and cities and counties by fire insurance companies not organized under the laws of California, but doing business therein, and providing for the disposition of such premiums," approved March 3, 1855: Stats. 1855, c. 15.

An answer was filed to the complaint, and thereupon, on motion, judgment was rendered for the plaintiff on the pleadings, from which defendant appeals.

The act requires every agent of the insurance companies designated to pay into the hands of the treasurer of any county or city and county in the state a sum equal to one per centum upon the amount of all premiums which, during the year, or part of the year, ending on the first Monday of September, shall have been received by such agent, or which shall have been agreed to have been paid for any insurance effected, or agreed to be effected, within the limits of such county or city and county; the money when so paid to constitute a fund known as the firemen's relief fund of the county or city and county in which the property insured is situated, and to be under the exclusive control of the fire commissioners, or other governing body of the fire departments of such county or city and county, under such general regulations as the board of supervisors thereof may prescribe.

The answer does not deny any of the material allegations of the complaint, but the defendant claims that the exaction is illegal, and that the statute imposing it is unconstitutional and void; that it is violative of various provisions of the constitution, and among them is section 12, article 11, which reads as follows:—

"The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

If this exaction is a tax, and the purpose to which the pro-

ceeds are devoted is a county, city, town, or other municipal purpose, it is plain that it is prohibited by this section. Both propositions are denied by respondent.

It is claimed that the object of the act is to prescribe a condition upon the performance of which foreign corporations shall be permitted to do business in this state; that the state may discriminate against such corporations in favor of her own citizens or domestic corporations; that as such foreign corporations have no rights under the state constitution, except such as are expressly guaranteed to them, *eo nomine* as foreign corporations; that the power of the state to impose conditions is not limited by general provisions of the state constitution, and is absolute unless specifically limited, either in the federal or state constitution; and in the absence of such limitations, foreign corporations, as such, have no rights which the state cannot touch.

This claim is certainly very broad, and is derived from the proposition that corporations have no absolute right to recognition in other states, but do business in such states merely by grace, depending for the enforcement of their contracts upon the assent of those states, which may be given on such terms as they please.

It is of some interest to note here that the power of the legislature to impose conditions is as absolute over domestic as over foreign corporations. There is no natural right in our own citizens to do business in a corporate name. These home corporations act as such purely by grace, and not by right, depending absolutely upon the consent of the state for the enforcement of their contracts, and that assent may be withheld or permitted on such terms as the state shall choose. It may exclude domestic corporations entirely from the state, and in the absence of express constitutional limitation, permit foreign corporations alone within its borders, or may impose a license tax upon domestic corporations which is not imposed upon foreign corporations. It may amend or repeal its charters at any time, or impose such new terms and conditions to the right to do business as it may see fit. This absolute power over domestic corporations was never denied or questioned, except as to the right to alter or amend the charters, and that right is clear under our constitution.

The whole force and effect of the decisions cited from the federal courts is, that foreign corporations are not protected by section 2, article 10, of the federal constitution, and therefore

the state may deal with corporations organized in other states as absolutely as with domestic corporations. When the courts of the United States speak of the power of the state to impose conditions upon foreign corporations, they, of course, have reference to federal limitations. There is no intimation that such corporations are not, when permitted to do business within a state, entitled to the protection of its laws as fully as citizens. That is not a federal question; but those courts have held that a statute of Iowa, which provided that any foreign corporation which should remove a cause from a state court to a federal court should forfeit its right to do business as a corporation within the state, was void: *Barron v. Burnside*, 121 U. S. 186. In that case, the statute made it a misdemeanor for any one to act as agent for any company which had forfeited its right to do business in the state under this act. Barron was convicted under the statute, and his conviction was declared illegal by the supreme court, on the ground that no such condition could be imposed.

The effect of this decision is, that the permit was valid, but the condition void. Following the logic of this case, the result would seem inevitable that a condition in violation of the state constitution is simply void. Indeed, this would seem too obvious to require much discussion. The fact that the party against whom a suit is brought to collect a tax may be a foreign corporation may be very material in determining whether the tax is prohibited by the constitution; but it could not authorize the legislature to exercise a power clearly denied to it in the constitution. Such laws are *ultra vires*, and as clearly void when they operate upon a foreign corporation as upon a citizen.

We come now to the inquiry, Is the exaction here in question a tax? The statute itself denominates it a tax, and it must be confessed that it has all the characteristics of a tax. It is a charge imposed by the legislature for the purpose of revenue. It is not founded upon contract, and does not establish the relation of debtor and creditor. It is an enforced proportional contribution, levied by authority of the state, and, as respondent claims, for public needs.

That it has all the attributes of a tax is practically admitted by the respondent; but it is sought, by a very subtile process of reasoning, to show that, in this particular case, it must not be regarded as a tax. However deftly it is stated, the point in all this specious logic is, that unless it be held

something else than a tax, it may be unconstitutional. Laws are not to be declared unconstitutional unless clearly so; and if two constructions are possible, and according to one the law must be held unconstitutional, and under the other construction it can be sustained, that construction must be adopted which will sustain the law.

This principle is not disputed, and it is often of great value, but it must not be pressed so far as to amount to an abdication of its functions on the part of the court, nor a denial of justice to suitors. If we can clearly see that a law is beyond the power of the legislature, we must so declare.

It is claimed that this is a sum paid by the corporation for the privilege of acting as such in this state, and therefore not a tax. The plausibility of the claim consists in apparently identifying this case with cases in which it is clear the exaction is a condition, and from which this is made to differ only in degree. If the condition had been that the corporation should pay a fixed sum for the privilege before it was allowed to do business at all, it would no doubt be held a condition, and not a tax; so, perhaps, if the license were required to be renewed at stated periods; and it has been held that, when the corporation is required to pay a percentage upon its receipts, and the payment is required to be secured by a bond before the corporation is allowed to do business in the state, this special requirement distinguishes it from ordinary taxation, and stamps its character: *Trustees Exempt Firemen's Fund v. Roome*, 93 N. Y. 325; 45 Am. Rep. 217.

So the two classes of cases, one of which is plainly taxation, and the other a sum paid for a permit, may be approximated until it is difficult or impossible to say to which class a given case may belong. These difficulties to discriminate the principles underlying different cases constantly included in different classes, and to which the same rule of decision cannot be applied, constitute the perpetual debating-grounds of the law, and occasion much of the confusion in the decisions. But, as was remarked by Judge Marshall, because we cannot easily draw the line does not prove that there is no difference in principle. No one fails to note the contrast between the light of day and the darkness of night, but no one is able to draw the line between daylight and darkness, or note the precise instant when one ends and the other begins. I have said that the act on its face denominates the exaction a tax, and that it is imposed according to the methods of taxation. It

is also manifest from the act that the chief reason of the tax is to raise money. No one can read the law without being so impressed. The purpose was to create a fund, and counsel have labored here to show that this fund was for a public and a highly meritorious and useful purpose.

We find, in the next place, that when the statute was passed, the conditions on which foreign corporations could do business were prescribed, and very full provision had been made on the subject: Pol. Code, secs. 622-624; see also Stats. 1871-72, p. 826. In the act in question these statutes are not alluded to, and they have never been amended or repealed. There is nothing in the law we are considering to indicate that it was intended as a condition, except when viewed in the light of the rule requiring us to so construe it rather than to declare it void.

Now, a business may be licensed and still be subject to be taxed. A license proper is a permit to do business which could not be done without the license. It is a mere permit. It may be thus licensed and then subject to a license tax. These licenses may not differ in form, but one is a license proper and the other is a license tax, imposed for the purpose of revenue.

This business, being first licensed, and then in a subsequent law subjected to a license in the form of a tax, the last law in no way intimating that the previous license is withdrawn unless the imposition is paid, the presumption is very strong that the exaction is for revenue purposes, and was not intended as a condition.

It is claimed, however,—1. If the exaction be a tax, it is imposed under the police power for the purposes of regulation, and therefore not liable to the objection; and 2. If it be such a tax, it is a condition, and even if unconstitutional, the corporation could waive the objection, and did so when, after the passage of the act, it continued to do business in the state.

When the police power is appealed to to justify legislation, there seems to be an impression that all claim of constitutional limitation is at an end; but let us inquire into the matter a little. With reference to the power of taxation, the principle is about this:—

The framers of the organic law, when they formulated limitations upon this power, had in view the burdens of taxation. They were providing for equality and uniformity only with reference to fair and just distribution of these burdens. It is

not to be presumed, however, that they intended to deprive the state of the power of self-preservation, or of accomplishing those acknowledged ends of all government,—the safety and welfare of the people. The requirement of equality applies mainly, if not entirely, to taxes upon property, laid upon the *ad valorem* principle. As to taxes upon occupation or business, the requirement is only of uniform operation, and this requirement is satisfied when it is uniform as to the class to which the law applies. Necessarily, to impose this tax, the population must be classified as to occupations, and it is not required that all occupations shall be taxed to justify a tax upon some. Perhaps it would be impossible to accomplish the end the government has in view in imposing a tax purely regulative or prohibitory, if the legislature is bound by the requirement of uniformity. These limitations are applicable only to the power of taxation, and are therefore held not to limit other functions of the government where entirely different ends are in view, although it is sought to reach them by a regulation having the form of a tax.

I think this tax is purely one for revenue; but admitting that the purpose is a mixed one, still it must conform to the limitations upon the taxing power, except in so far as a departure is necessary to make it regulative or prohibitory. It could be made just as effectual as a police regulation without violating the provision of our state constitution under consideration.

As to the proposition that the corporation waived the constitutional objection by continuing to do business after the passage of the act, it is enough, in my opinion, to say that it is a mere *petitio principii*. If the condition be void, no implied assent can be claimed.

It remains to inquire whether the tax was imposed upon the counties, cities and counties, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purpose. It was quite unnecessary to call attention to the fact that the tax is not upon a county or city as a corporation, and unless the point had been distinctly made, it would have been thought quite unnecessary to say that it was not the purpose of the section to prohibit such impositions. The constitutional convention cannot be supposed to have thought it necessary to prohibit the legislature from imposing a tax upon a municipal corporation as such for the use of the mu-

nicipality. It may also be admitted that the defendant is not an inhabitant of the municipality, within the meaning of this provision, although this is by no means a clear proposition. It is not necessary for the case to decide it. The same may be said of the claim that the imposition is not a tax upon property. In my opinion, the purpose of the section is to relegate to the local boards the whole subject of county and municipal taxes for local purposes, and that the legislature has no power to impose any tax whatever within those territories for local purposes.

If the purpose of the fund created by the tax is a public purpose at all, it is clearly a municipal purpose. The management and control of the fire departments have always been left to local authorities. The fact that the state at large has an interest in the efficiency of the departments does not render the end any less a municipal one. The people of the state have such an interest in all the police powers granted to these municipalities. And even if the state may exercise a concurrent supervision over a subject, still, so far as actually controlled by the local board, it is a matter of municipal concern.

It is claimed by the appellant that the law is in conflict with many other provisions of our constitution, and also that no provision being made for a suit to collect the tax, this action is without authority. Taking the view I have of the objections here discussed, it is not necessary to pass upon other objections.

I think the judgment should be reversed, and it is so ordered.

McKINSTRY, J., concurring. I concur with Justice Temple. I am of opinion, also, that the statute in question violates sections 31 and 32 of article 4, and section 6 of article 11, of the constitution; further, that the statute did not authorize, nor does it purport to authorize, the commencement and prosecution of the present action, and that the action is not authorized by any other law.

POWER OF STATE TO DISCRIMINATE AGAINST FOREIGN CORPORATIONS DOING BUSINESS THEREIN: See the note to *Ducat v. Chicago*, 95 Am. Dec. 536, where all of the questions raised in the principal case are discussed.

IN RE SHILLABER.

[74 CALIFORNIA, 144.]

PAPER MAY BE REFERRED TO AND MADE PART OF A WILL, if such paper is then in existence, and is so referred to in the will that it is capable of being identified from inspection, or by the aid of parol or other evidence.

PAPER REFERRED TO IN A WILL, BUT NOT IN EXISTENCE UNTIL AFTER THE WILL IS EXECUTED, may not be admitted to probate as a part thereof. Hence, if a will bequeaths property to the executor to be disposed of as directed in a letter to him from the testator of the same date, and such letter is written and signed after the will is executed, though on the same day, it cannot be admitted to probate as a part thereof.

WILL CANNOT BE DENIED PROBATE BECAUSE IT REFERS TO ANOTHER PAPER as a part thereof, which cannot be admitted to probate, nor because bequests therein are void for uncertainty.

McAllister and Bergin, for the appellant.

Carroll Cook, Garber, Thornton, and Bishop, and William Hoff Cook, for the proponent and respondent.

M. C. Blake, for the absent and minor heirs.

Lloyd and Wood, for certain heirs.

PATERSON, J. The document which was admitted to probate in this proceeding is wholly in the handwriting of Mrs. Shillaber, deceased. The third clause of the will reads as follows: "I give and bequeath to my said executor my silverware, jewelry, paintings, organ, clothing of every description, carriage, library, bas relievos, bronzes, statuary, excepting my three large pieces, viz., 'Delilah,' 'Saul,' and 'Lost Pleiad,' and request him to dispose of the same in the manner specified in my letter to him of this date." After the execution of this will, she dictated a letter to Carroll Cook, Esq., named in her will as executor thereof. This letter is in the handwriting of Mr. Cook, but is signed by the deceased. It commenced as follows:—

"SAN FRANCISCO, CAL., September 8, 1884.

"To CARROLL COOK, Esq., San Francisco, Cal.

"*My Dear Nephew*,—In my will, which I have this day executed, I have left certain personal property to you to be disposed of by you as I should by letter direct. I desire the following disposition made thereof, viz.," etc. (Here follow directions for disposition of the articles above named.)

The court found, and the finding is supported by evidence, that the letter was dictated and signed after the execution of the will. Upon the objection that the letter was not in

existence at the time of the execution of the will, it was excluded, and the document, which is wholly in the handwriting of Mrs. Shillaber, was admitted to probate. It is claimed by appellant that the two documents were designed to constitute one instrument; that they are such in law, and as they are not wholly in the handwriting of the deceased, they do not constitute a valid olographic will.

All the authorities to which our attention has been called agree that any paper may be referred to, and may be a part of the will, if such paper be in existence at the time of the execution thereof. If the will be duly executed and attested, the paper referred to, whether attested or not, will become a part of the will, if it be already in existence, and is clearly described and identified. The identification must be by a description given of the paper in the will. In the case at bar, the letter referred to was not in existence at the time of the execution of the will. It has been held that "a reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that where there is a reference to any written document, described as then existing in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is, whether the evidence is sufficient for the purpose": *Allen v. Maddox*, 11 Moore P. C. C. 454. We think that, under the evidence and the language of the will, the letter was properly excluded.

It is claimed that without the letter the will is incomplete, for only through the letter can the beneficiaries therein named make title to the bequests provided for them. We think, however, that the will, being effective in other parts, was properly admitted to probate, although the bequests named in the third article above quoted be void for uncertainty: *George v. George*, 47 N. H. 45; *Brown v. Bendell*, L. R. 21 Ch. Div. 667. The property named in the third article is evidently but a small part of the estate. It is all personal property, and intestacy as to any portion of the estate should be avoided if possible. Our code provides that "of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy." It is not clear that the will without the letter is incomplete. It has been held that as to personal property, a document like this letter, although not entitled to probate as a part of the

will, is sufficient to enable the beneficiaries named in it to proceed in a court of equity after the property is distributed to the executor under a clause of the will similar to that quoted above, to compel the executor to execute the trust in accordance with the directions contained in the letter: *In re Fleetwood*, L. R. 15 Ch. Div. 594.

Judgment and order affirmed.

PAPER MAY BE REFERRED TO IN WILL AND MADE A PART THEREOF: See *Ford v. Ford*, ante, p. 117.

LOUGHBOROUGH v. McNEVIN.

[74 CALIFORNIA, 250.]

LIEN OF PLEDGEE IS EXTINGUISHED BY A VALID TENDER to him of the amount due and his refusal to accept it.

PLEDGE IS GUILTY OF CONVERSION IF HE DECLINES TO ACCEPT A VALID TENDER of the amount due him, and thereafter refuses a demand made on him to surrender the pledged property to the person entitled thereto. This conversion, being wrongful, extinguishes the pledgee's lien.

TENDER OF AMOUNT DUE PLEDGEE IS NOT VITIATED by a demand made at the same time for the surrender of the pledged property.

TENDER OF AMOUNT DUE PLEDGEE MAY, under the Civil Code of California, be made after the debt becomes due, although demand for the payment of the debt has been before made and refused, if accompanied with an offer to pay the interest which has accrued.

PLEA OF TENDER IS SUFFICIENT THOUGH THE MONEY IS NOT BROUGHT INTO COURT.

REFUSAL TO DELIVER PLEDGED STOCK TO THE PLEDGOR'S ASSIGNEE IS NOT JUSTIFIED BY ITS ATTACHMENT under a writ against such pledgor, subsequent to such assignment.

PLEDGE IS ANSWERABLE FOR DEPRECIATION IN VALUE OF PLEDGED PROPERTY after he has refused to accept a valid tender of the debt, and a demand for the possession of the property; and this is equally true whether an action is brought against him as for a conversion, or a bill is filed against him to redeem from the pledge.

TROVER IS THE USUAL ACTION TO ENFORCE A REDEMPTION OF A PLEDGE.

INTERVENTION. — ASSIGNEE PENDENTE LITE FROM ONE OF THE DEFENDANTS of the latter's interest in pledged stocks, and of his claim for damages for their conversion, — the suit being to foreclose the pledgee's lien, — may be allowed to intervene for the purpose of asserting such interest and claim for his own benefit.

ACTION commenced by Eugene Casserly against Henry P. McNevin, Teresa E. McNevin, and L. P. Drexler, to have an account taken of the amount due Casserly from Henry P. McNevin, and for which certain stocks were held in pledge, and to have such stocks sold to pay such amount. J. F. Eagan

was allowed to intervene, and judgment was entered in his favor and against Casserly, on the facts shown in the opinion. Casserly afterwards died, and the further prosecution of the action was in the name of Loughborough as his administrator.

Wilson and Wilson, and S. M. Wilson, for the appellant.

D. L. Smoot, Ogden Hiles, M. N. Stone, and B. B. Newman, for the respondents.

THORNTON, J. The judgment and order appealed from are affirmed for the reasons given in the decision by Department Two, filed June 27, 1887.

The following is the opinion of Department Two, above referred to:—

THORNTON, J. The plaintiff's intestate, some time prior to October, 1876, lent defendant, Henry P. McNevin, a sum of money, for which he received as security some shares of stock. On the 19th of July, 1877, McNevin assigned to defendant L. P. Drexler his interest in the stock above mentioned, in consideration that Drexler would assume the payment of his debts due to Casserly on said stock. This assignment Drexler accepted, and on the 21st of the same month informed Casserly of such assignment. On receiving this notice, Casserly, on the same day, declared his willingness to deliver the stock to Drexler upon receiving the money secured by it. On the 22d of September, 1877, Drexler made a legal tender to Casserly of the amount due to him on the stock, and demanded a delivery of it. Casserly made no objection to the tender, admitted that it was correct and sufficient, but refused to accept the money and deliver the stock, on the ground that process of garnishment in the matter of an order for money against Henry P. McNevin in favor of defendant Teresa E. McNevin had been served on him on September 1, 1877. On the 28th of September, 1877, six days after the tender was made and refused, this action was commenced by Casserly. Henry P. McNevin, Teresa E. McNevin, and Drexler were made defendants to the action. The object of the action was to have an account taken of the amount due by McNevin to him, that the money found due him be adjudged to be paid him by Teresa E. McNevin or Drexler, as either shall be found entitled thereto, and in default of payment, that the defendants be foreclosed of all right of redemption, etc., for a sale, etc. H. P. McNevin answered, stating that he had, on the 19th of

July, 1877, sold and assigned the stock to Drexler in good faith, for the consideration of eleven thousand dollars, paid him by his vendee. T. E. McNevin answered, denying that Drexler ever purchased the stock of Henry P. McNevin, denied that there was due to Casserly from H. P. McNevin any sum greater than \$9,837.27, secured as above mentioned, and stated that she claimed a lien upon the stock under executions issued in the action brought by her against Henry P. McNevin, by means of which the stock was attached. The executions mentioned were issued on orders made in the action just above mentioned. In the same action an order was made, which was served on Casserly on the sixteenth day of September, 1877, directing him not to pay over or transfer any property held by him belonging to H. P. McNevin.

Drexler, in his answer, set up the assignment to him, the notification to Casserly of this assignment, the tender to Casserly and its refusal by him, as they are set forth herein, and averred his willingness and readiness to pay, and then offered to pay into court the amount due Casserly, as the court should direct, upon Casserly's delivering to him the stock held by him as security.

J. F. Eagan, on the 18th of February, 1879, filed a complaint in intervention, in which he averred an assignment to him by Drexler of the stock held by Casserly as security, and also of all claim for damages by Drexler for the conversion of the stock thereafter mentioned. He then goes on to aver the facts showing a conversion by Casserly, which are the facts above set forth by Drexler in his answer, and the further fact that Casserly refused, upon the tender made him in September, 1877, to accept the said amount tendered, and deliver the stock to Drexler. Casserly demurred to the complaint of Eagan, which was overruled. He then answered the complaint last mentioned, denying the conversion averred.

The cause was tried, and judgment rendered against Casserly in favor of Eagan for the sum of \$15,225 and costs. Casserly moved for a new trial, which was denied. This appeal is prosecuted from the judgment and order above mentioned.

Casserly held the stock as a pledge. He so states in his complaint; and under section 2924, Civil Code, having it in his possession, as it was personal property, it was a pledge, whether the title passed to him or not.

The lien of a pledgee is extinguished when a tender of the

amount due on the debt is made according to law, and its refusal by the pledgee: *McCalla v. Clark*, 55 Ga. 53; *Ratcliff v. Vance*, 2 Mill Const. 239. Upon such tender being made and refused, the pledgor is entitled to the property pledged, and certainly when, on or after such tender, a demand is made for the pledge, which is refused, a conversion takes place: See cases just above cited. The refusal to deliver the pledged property on demand is an exercise of dominion over the property of another in defiance of the other's right, which is a conversion: *Dodge v. Meyer*, 61 Cal. 420, 421. Such conversion is wrongful, and extinguishes the lien, under section 2910, Civil Code: See *Rodgers v. Grothe*, 58 Pa. St. 414; *Davis v. Bigler*, 62 Id. 242; *Lawrence v. Maxwell*, 53 N. Y. 19.

Was the tender in this case made in accordance with law? It was of the whole amount—principal and interest—due to Casserly. The demand made at the same time that the stock pledged be delivered to him, conceding it to be a condition, was one which he had a right to impose, as it was concurrent with the payment of the money in accordance with Casserly's promise in his letter of July 21, 1877, to Latham and King, the agents of Drexler, that on payment of the money, he would transfer the stock, which latter was communicated by Latham and King to Drexler. The announcing of such condition did not vitiate his tender. It is so declared in section 1498, Civil Code: See *Wheelock v. Tanner*, 39 N. Y. 481.

The tender was made in time. The code (sec. 1490, Civ. Code) provides that where an obligation fixes the time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterward. But where an obligation does not fix the time of performance, an offer of performance may be made at any time before the debtor, upon a reasonable demand, has refused to perform: Civ. Code, sec. 1491. The obligation of McNevin was to repay the advances after a reasonable time, whenever he should be thereunto requested by the plaintiff. This was averred in the complaint, and not denied in the answer. The time of performance was not then fixed by the obligation. A request to pay, which is tantamount to a demand, was made by Casserly of McNevin on or about the 26th of June, 1877, and refused. The tender could not have then been made after this demand except for section 1492, Civil Code, which provides as follows:—

“Where delay in performance is capable of exact and

entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditors, or by any other person in the mean time."

We are of opinion that the tender is good under this last section, as the interest offered was compensation for the delay.

It is said that the plea of tender by Drexler is insufficient, for the reason that he did not bring the money into court. We think the plea is sufficient without bringing the money into court. This is so held in *Kortright v. Cady*, 21 N. Y. 343, 354, 366; 78 Am. Dec. 145. The authorities referred to in the cases just cited in the opinions of Davis, J., and Comstock, C. J., sustain this rule. The plea here is in accordance with section 1495, Civil Code, and it is expressly provided by section 1504, Civil Code, that an offer of payment duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof. One of these incidents is the discharge or extinction of the lien. The rule laid down in *Kortright v. Cady* is the same: 21 N. Y. 353, 366; 78 Am. Dec. 145.

The tender was not objected to by Casserly when made. The lien having been extinguished, Drexler was entitled to the possession of the stock. Casserly then had no right to withhold it from Drexler.

We cannot see how an attachment by Teresa McNevin, a third person, with whom Drexler had no connection or privity, could justify the plaintiff's intestate in his detention of the stock.

The stock was the property of Drexler when it was attached, subject to the lien for the debt due to Casserly, and the attachment of it as the property of H. P. McNevin gave him no right to detain it from Drexler, when a proper tender had been made and refused.

The answer of Drexler was in effect an action to redeem. In such action, whether the right is enforced by an action of trover or by a bill pure and simple to redeem, the pledgee will be responsible to the pledgor for depreciation in the value of the pledged property, after a tender of the amount due and the refusal by the pledgee: *Griswold v. Jackson*, 2 Edw. Ch. 461; *Jackson v. Griswold*, 4 Hill, 522; *Hathaway v. Fall River*

National Bank, 131 Mass. 14; *Hancock v. Franklin Ins. Co.*, 114 Id. 155. Eagan's complaint in intervention set forth the right to redeem, as well as did the answer of Drexler, and in fact more fully by stating a case of conversion. The action of trover is a very usual mode of enforcing a redemption of a pledge: See Jones on Pledges, sec. 561.

We are of opinion that the complaint in intervention by Eagan was regular and within the statute: Code Civ. Proc., sec. 386.

We find no error in the record, and the judgment and order are affirmed.

LIEN IS EXTINGUISHED BY VALID TENDER: See note to *Moynahan v. Moore*, 77 Am. Dec. 489-491, where the whole subject of tenders is discussed.

VALID TENDER ENTITLES PLEDGOR TO RETURN OF PROPERTY PLEDGED: *Bryson v. Rayner*, 90 Am. Dec. 69, and note.

WAGGLE v. WORTHY.

[74 CALIFORNIA, 266.]

DISCHARGE IN INSOLVENCY OR BANKRUPTCY, IF NOT PLEADED, is waived.

If pleaded, but disregarded by the court, and judgment entered against the insolvent, it is conclusive of his liability while it remains in force, although the debt on which it was founded may have existed before the petition in insolvency or bankruptcy was filed.

A HOMESTEAD DECLARATION, FILED WHILE THE CLAIMANT HAS ANOTHER HOMESTEAD duly selected, and never abandoned, is void. The fact that the first homestead was sold under execution and surrendered to the purchaser is immaterial, because, such sale being void, the homestead right is in no way affected thereby.

PARTY CANNOT HAVE TWO HOMESTEADS AT THE SAME TIME; and if he attempts to acquire a second while the first is in force, the second is void, and subject to judgment liens.

Nourse and Church, and George A. Nourse, for the appellants.

Terry and Terry, for the respondent.

HAYNE, C. This is an action upon a covenant against encumbrances implied by statute, from the use of the word "grant" in a conveyance of real property: Civ. Code, sec. 1113. The conveyance was made on July 5, 1884. The breach alleged is, that the property was, at the date of the deed, subject to the lien of a judgment "suffered" by the vendor for \$840.30, docketed on the 21st of March, 1884, under which

the property was sold and subsequently redeemed by the plaintiff. The cause was submitted on briefs; but no brief for respondent is on file. So far as we can gather, the defenses were two, viz.: 1. That on February 12, 1884, the vendor had filed her petition in insolvency, and received her discharge from such claims as existed at the date of filing her petition; and 2. That the property was the homestead of the vendor, and therefore was not subject to the lien of the judgment. The court below gave judgment for the defendants, and the plaintiff appealed.

1. The discharge in insolvency could only affect such debts as existed at the time of the filing of the petition, viz., on February 12, 1884 (Ins. Act, sec. 51), and this is all that the discharge in question purported to do. The claim arising from the breach of a covenant made subsequently was not affected by it.

It may be that the debt upon which the judgment against the vendor was obtained was within its operation. But that matter was concluded by the judgment. If the discharge was not pleaded in that action, it was waived. If it was pleaded, and disregarded by the court, the judgment, however erroneous, was not void, and is not subject to collateral attack. The defendants cannot retry that action here.

2. The homestead claimed by the defendants to have prevented the lien of the judgment from attaching to the property was declared on June 1, 1881. To show the invalidity of this alleged homestead, the plaintiff proved that the vendor had declared a homestead on other land on March 21, 1873. And in reply, the defendants proved that this last-mentioned homestead had (previously to the declaration of the other homestead) been levied upon and sold under two judgments rendered by a justice of the peace. In relation to this the vendor testified as follows: "Immediately after the sale of my first homestead, the purchaser, Jacobs, demanded possession of me, and as I was poor and dreaded a lawsuit, I gave up possession, and moved off the land. Jacobs went into possession, and since that time I have claimed no interest in the said land embraced in my first homestead."

But so far as this record shows, the sale to Jacobs was of no effect. A homestead is exempt from execution; and if the land was worth more than five thousand dollars (which does not appear), the proceedings provided by the code for ad-measuring the excess (Civ. Code, secs. 1245 et seq.) should

have been taken. This not having been done, the attempted sale was void. The homestead still existed, and was not abandoned by the claimants moving off the premises. In this state, "a homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged," etc.: Civ. Code, sec. 1243. It results that the first homestead was a valid and subsisting homestead at the time the second was attempted to be declared. A party cannot have two homesteads; and if he attempts to acquire a second while the first is in force, the second is void.

The second "homestead" being void did not prevent the lien of the judgment from attaching to the land conveyed to the plaintiff.

We therefore advise that the order denying a new trial be reversed, and the cause remanded for a new trial.

The COURT. For the reasons given in the foregoing opinion, the order denying a new trial is reversed, and cause remanded for a new trial.

DISCHARGE IN INSOLVENCY MUST BE PLEADED: *Hollister v. Abbott*, 64 Am. Dec. 342, and note.

PARTY CANNOT LAWFULLY HOLD TWO HOMESTEADS AT ONE TIME: *Kaes v. Gross*, 1 Am. St. Rep. 767, and note.

SUTRO v. PETTIT.

[74 CALIFORNIA, 332.]

MUNICIPAL BONDS ISSUED IN EXCESS OF THE NUMBER AND AMOUNT authorized by law are void.

IF MUNICIPAL BONDS ARE ISSUED WITHOUT ANY AUTHORITY, there can be no *bona fide* holding of them, nor can there be any estoppel or ratification which will preclude the municipality or its officers from denying their validity. Hence the action of the board of supervisors (when they are county bonds) ordering them to be redeemed is of no consequence.

THOSE WHO CONTRACT WITH MUNICIPAL CORPORATIONS are bound to know the extent of the powers of their officers.

J. N. Turner and J. R. Patton, for the appellant.

J. M. Wilcoxon, for the respondents.

McFARLAND, J. This is an appeal from a judgment of the superior court of San Luis Obispo County, rendered on a writ of *mandamus*, commanding the appellant to pay to the respondents certain bonds alleged to have been issued by said county.

The legislature, by an act passed April 4, 1870, which was amended by an act passed March 14, 1872, authorized the board of supervisors of the county of San Luis Obispo to issue bonds of said county, "not exceeding in the aggregate the sum of forty thousand dollars," for the purpose of erecting a court-house: Stats. 1869-70, p. 816; Stats. 1871-72, p. 369. The act provides what interest the bonds should bear, and when they should be payable, and that they should be "of such denominations respectively as the board shall order." It is also provided that the clerk of the board should keep a register of the date and number of each bond issued, and the amount realized from the sale thereof, with the name of the purchaser. Two copies of said register were required to be made by the clerk, one to be kept in the office of the county auditor, and the other in the office of the county treasurer. The bonds were to be issued from time to time as the work on the court-house progressed.

The board determined that the bonds should be of the denomination of one hundred dollars, and accordingly four hundred bonds were issued and numbered consecutively from 1 to 400, which of course amounted to forty thousand dollars, the whole amount allowed by the act. But twenty additional bonds were issued, numbered from 401 to 420, which were over-issues, and entirely unauthorized by the act. These twenty last-named bonds were purchased by respondent for a valuable consideration before maturity, and in the ordinary course of business, and are the subject of this litigation. They were in form negotiable. Interest was paid on them for several years. On the first day of January, 1880 they were outstanding and unpaid.

Subdivision 14 of section 25 of the county government act (Stats. 1883, p. 305) provides that "the board of supervisors of any county having an outstanding indebtedness, on the first day of January, 1880, evidenced by bond or warrants thereof," may fund or refund the same, or may pay them with the proceeds of the sale of new bonds issued for that purpose. In supposed accordance with this provision, the board of supervisors of San Luis Obispo County, on May 4, 1885, ordered that the whole of said four hundred and twenty court-house bonds, amounting to forty-two thousand dollars, together with ten thousand dollars of road-repair bonds, be redeemed and paid with the proceeds of the sale of fifty-two thousand dollars' worth of new bonds. The new bonds were issued and

sold, realizing over fifty-two thousand dollars. The appellant (treasurer) paid all of said court-house bonds, numbered from 1 to 400, but refused to pay the said twenty bonds held by respondents, numbered from 401 to 420. And from the judgment of the superior court commanding him to pay them, the treasurer appeals.

There is a line of judicial decisions in cases where the validity of municipal bonds depended on the happening of some precedent contingency of fact, and the question was, whether the officers executing the bonds were vested with the discretion or power to determine if the contingency had happened. For instance, when municipal officers have been authorized to issue bonds in aid of railroads, after a proposition to issue them shall have been adopted by the people at an election, the question has frequently arisen whether the officers had power to determine that such election had been properly held, and whether a recital of that fact on the face of the bonds was binding on the municipality. And on such questions the decisions of courts have not been uniform. (The subject will be found fully discussed and authorities cited and quoted in the last few pages of volume 1 of Dillon on Municipal Corporations.) But no such question arises in the case at bar. The validity of the bonds issued under the act of April 4, 1870, did not depend upon any fact—any matter *in pais*—to be determined by the supervisors. The power to issue the bonds, and the limitation of that power, depend wholly upon the language of the act itself, and not upon any extrinsic contingency. There was nothing left to the discretion of the officers, as in the case of *Porter v. Haight*, 45 Cal. 631, nor was there any authority to do what “might appear to them advantageous to the county,” as in *Nevada Bank v. Steinmitz*, 64 Id. 301.

Neither can the doctrine of estoppel, or of ratification, or of *bona fide* holding, be successfully invoked by respondents. Those doctrines can be invoked against municipal corporations—if at all—only in cases of informality, irregularity, etc., on the part of an authorized agent: Dillon on Municipal Corporations, 3d ed., secs. 457, 463, 511–553, and cases cited. “Where there is a total want of authority to issue municipal bonds, there can be no *bona fide* holding of them”: *Town of East Oakland v. Skinner*, 94 U. S. 255. It is clear—in this state at least—that the issuance of bonds is not within the scope of the general and ordinary powers of a board of super-

visors, and that such bonds can be legally issued only by virtue of express authority of the legislature: Dillon on Municipal Corporations, secs. 485, 507, and cases there cited; *Lindon v. Case*, 46 Cal. 172; *Wallace v. Mayor of San Jose*, 29 Id. 181; *El Dorado County v. Davidson*, 30 Id. 521; *Robinson v. Supervisors of Sacramento County*, 16 Id. 208; *Foster v. Coleman*, 10 Id. 281; *People v. Supervisors of El Dorado County*, 11 Id. 170. The bonds in question, therefore, were issued without any authority at all, and are wholly void. And the action of the board of May 4, 1885, ordering these bonds to be redeemed, was, of course, of no value. The character of one void act of public officers cannot be changed by a second void act of the same officers, declaring the first act to be valid.

It is quite probable that the respondents paid full par value for these bonds, and that they will lose their money. But "those who contract with a municipal corporation are bound to know the extent of the power of its officers": *Wallace v. Mayor of San Jose*, *supra*. Respondents would have discovered the worthlessness of the bonds upon the slightest inquiry. At all events, hard cases cannot be allowed to make bad law. An over-issue of twenty thousand dollars would have been no less valid than the over-issue of two thousand dollars; and any other rule would put the people of a county in the complete power of careless or unscrupulous public officers.

The judgment of the superior court is reversed, with direction to dismiss the proceeding.

DEFENSES TO ACTIONS UPON MUNICIPAL BONDS is the subject of the note to *De Voss v. Richmond*, 98 Am. Dec. 664 et seq., where the questions involved in the principal case are fully discussed.

PERSONS DEALING WITH MUNICIPAL CORPORATIONS ARE BOUND TO KNOW the extent of the powers of their officers: *Clark v. Des Moines*, 87 Am. Dec. 423.

WEIDEKIND v. TUOLUMNE WATER COMPANY.

[74 CALIFORNIA, 386.]

CHANGING OF SIDES BY AN ATTORNEY AT LAW WHO HAS REPRESENTED ONE OF THE LITIGANTS at a former trial of the cause ought not to be permitted by the court; and if permitted, this is an irregularity on account of which a new trial should be granted.

FAILURE OF CLIENT TO PAY HIS ATTORNEY FOR SERVICES RENDERED IN THE CASE will not justify the latter in appearing at subsequent stages of the cause as attorney for the adverse party.

Frank W. Street, for the appellant.

Edwin A. Rodgers, for the respondent.

FOOTE, C. This is an action to recover damages alleged to have been done to the plaintiff's mining claim, as is asserted, by the negligence of the defendant, which eventuated in the breaking of a dam, and the overflow of the water which it had confined.

The jury trying the cause returned a verdict for the defendant, upon which the court rendered judgment, from which, and an order overruling a motion for a new trial, the plaintiff has appealed.

The plaintiff assigns for error, that the court, against his objection, allowed an attorney and counselor at law who had formerly acted for plaintiff in this very case, when it was previously tried, to appear and act on behalf of the defendant on the trial of the cause last had. That attorney made this statement regarding the matter in the presence of the court, while the trial was progressing:—

“As the court well knows, Mr. Weidekind [the plaintiff] in the first trial of this case did retain Mr. Dorsey and myself I drew the complaint and participated in the first trial of this case in this court. My compensation was to depend upon my success; as soon as I had earned that by our success, this plaintiff saw fit to discharge me and retain other counsel; with that act of his I have never found fault. I have never been paid a cent by him for my services. An appeal was taken from the judgment in that trial entered. A new trial was granted by our supreme court. A new trial was had. Judgment was entered against plaintiff. An appeal was again taken, and another reversal followed. In each of these trials plaintiff has had other counsel than myself. I am here to assist Mr. Rodgers in the trial of this case, with all the knowledge I have gained in the three trials.”

Thereupon he did act as an attorney and counselor on the trial, sitting by and assisting the attorney of record, arguing disputed points before the court, and examining witnesses, the court having overruled the repeated objection of the plaintiff's counsel.

This action of the court is contended to be such an irregularity on its part as prevented the plaintiff from having a fair trial. It was within the power of the court, if satisfied that the attorney in question had acted on the plaintiff's side of the case on the former trial, to prohibit his acting on the other side in another trial: Weeks on Attorneys at Law, sec. 120.

There can be no doubt from the statement of the attorney to

the court that he proposed to act, and it is also certain that he did act, as an attorney and counselor for the defendant in the trial of a cause where he had formerly acted for the plaintiff.

The trial court had a right and it was its duty to have forbidden the attorney from changing sides in the same suit, though at different trials; for to do otherwise was "to defeat the very purpose for which courts were organized, viz., the administration of justice": *Wilson v. State*, 16 Ind. 392.

The evidence in this case and the statement of the attorney himself was sufficient to show the court that his intention was, for the benefit of the defendant, to use at that time all the knowledge and secrets he had gained from his former client in preparing for and conducting one trial, and observing and watching the developments of two others.

This court, speaking to such a question, says: "We are of opinion that the court in that case would have restrained him, even had he been unjustly discharged, and he was allowed, as contended, to be employed by the adverse party. The law secures the client the privilege of objecting at all times and forever to an attorney, solicitor, or counselor from disclosing information in a cause confidentially given while the relation exists. The client alone can release the attorney, solicitor, or counsel from this obligation. The latter cannot discharge himself from the duty imposed on him by law": *In re Cowdery*, 69 Cal. 50; 58 Am. Rep. 545.

The attorney himself boldly avowed his intention so to act; the court permitted him to do it, notwithstanding the plaintiff's objection. This we think was an error, and in the absence of any proof to the contrary, injury must be presumed to have resulted to the plaintiff, whereby he was prevented from having a fair trial of his case.

We perceive no further prejudicial error, but for the reasons indicated, the judgment and order should be reversed, and the cause remanded for a new trial.

THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

ATTORNEY CANNOT CHANGE SIDES IN CASE. — In case of *In re Cowdery*, 58 Am. Rep. 544, an attorney who had represented the city as its official attorney, upon the expiration of his term accepted a retainer from the parties on the other side of the case, and the court held that he was guilty of unprofessional conduct, and temporarily disbarred him.

PEOPLE v. GREENE.

[74 CALIFORNIA, 400.]

JUDGMENT IS VOID FOR WANT OF JURISDICTION OVER THE DEFENDANTS, if the summons is not personally served on any of them, and there is no order of the court or judge for its service by publication, and the judgment is entered before the time had elapsed for them to appear and answer, had there been due service by publication.

MOTION TO SET ASIDE A JUDGMENT IS A DIRECT, AND NOT A COLLATERAL, ATTACK THEREON.

JUDGMENT VOID FOR WANT OF JURISDICTION OVER DEFENDANT MAY BE SET ASIDE AFTER THE LAPSE OF TWELVE YEARS, on motion. The power of the court to vacate a judgment which appears to be void from an inspection of the judgment roll is inherent. It does not expire by lapse of time, nor is it restricted by section 473 of the Code of Civil Procedure of California, designating the time within which motions may be made for relief against judgments entered against a party by mistake, accident, surprise, or excusable neglect.

THE EXECUTION OF A VOID JUDGMENT WILL BE STAYED BY THE COURT. Courts will not permit their process to be abused by attempts thereunder to enforce void judgments.

MOST EFFECTUAL MODE OF PREVENTING ABUSE OF PROCESS BY USING IT TO ENFORCE A VOID JUDGMENT is by extirpating the judgment itself, — by removing a form which is without substance.

ACTION to foreclose the interest of the defendant, Greene, held by him under a certificate of purchase issued to him by the state. A judgment was entered against him in 1872 by default. In 1883, F. A. Hyde moved to vacate the judgment, and certain proceedings were thereupon taken, as shown in the opinion, resulting in the denial of his motion; and thereafter, in due time, he appealed. The appellant, among other points, urged that the motion to vacate ought not to be granted, because it was not made within the time provided for in section 473, California Code of Civil Procedure. Such section, so far as material, is as follows: "The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may, upon like terms, allow an answer to be made after the time limited by this code; and may, also, upon such terms as may be just, relieve a party, or his legal representative, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken."

C. A. Storke, S. W. Bouton, Orestes J. Oreña, and Sawyer and Burnett, for the appellant.

J. D. Redding, Crittenden Thornton, and S. S. Price, for the respondent.

SEARLS, C. J. This is an action to foreclose the interest of defendants, obtained by virtue of a certificate of purchase for the north half of section 28, township 9 north, range 32 west, San Bernardino meridian, county of Santa Barbara.

Judgment was rendered in favor of plaintiff. The appeal is from an order made August 17, 1886, refusing to set aside the judgment.

The complaint in the cause is entitled "People of the State of California v. W. E. Greene, John Doe, Richard Roe, et al."

It proceeds to aver that the defendant (without naming him) located the north half of section 28, township 9 north, range 32 west, San Bernardino meridian, county of Santa Barbara, on the fifteenth day of October, 1868; that on the sixteenth day of November, 1868, the said defendant purchased said lands, and received a certificate of purchase therefor, known and numbered as certificate No. 1191.

The complaint further shows that on the first day of January, 1872, there was due plaintiff, as interest on said certificate of purchase, the sum of ninety-six dollars, and avers a publication of the delinquent list, with notice, etc., as provided by statute.

There is no averment of ownership of this certificate except as above stated, and no allegation that the owner is unknown.

A summons issued to "W. E. Greene et al., defendants," dated September 27, 1872, which recited that this action was brought to obtain a decree foreclosing the interest of defendants "in certificate of purchase No. 1291."

The summons was returned on the same day (September 27, 1872) by the sheriff, who certified that "the same has not been served on the defendants, for the reason that the defendants named in said summons do not reside in this county, and their place of residence is not known to me."

On the same day an *alias* summons issued, which is a copy of the former summons except that instead of being entitled People etc. v. W. E. Greene et al., defendants, it is entitled People etc. v. "W. E. Greene and all unknown owners," and with the further difference that it recites that the action is

brought to obtain a decree foreclosing the interest of defendants in certificates Nos. 1290, 1291, 1395, and 1396, etc.

The action was brought in the district court, and the summons notified and required the defendants to answer within ten days of service within the county (Santa Barbara), within twenty days of service without the county and within the district, otherwise within forty days.

The record fails to show any affidavit for publication of summons, or order of the judge or court directing such publication.

There is an affidavit of E. B. Boust as follows: —

“STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA, ss.

“E. B. Boust, being duly sworn, says he is publisher of the Santa Barbara Times, a newspaper published weekly in the town and county of Santa Barbara, state of California; that a summons, a true copy of which was duly published in said newspaper for four consecutive weeks, to wit, from the second day of October, A. D. 1872, to the second day of November, A. D. 1872.

“E. B. BOUST.”

“Subscribed and sworn to before me this thirteenth day of November, A. D. 1872.

(Seal)

“A. S. COOPER, Notary Public.

“Filed November 16, A. D. 1872.

“F. A. THOMPSON, Clerk.

“By F. N. GUTIERREZ, Deputy.”

To this affidavit a printed copy of the *alias* summons is attached, but the affidavit does not, as may be seen, make any reference thereto.

Judgment by default was taken against defendants November 21, 1872, that is to say, in less than forty days after service of summons, if due service thereof is shown.

In June, 1883, F. A. Hyde moved on petition, showing him to be the owner of certificate No. 1291 by assignment, to have the judgment set aside and for leave to answer. His motion was granted August 18, 1883, and an answer was filed by Hyde on the same day setting up a defense to the action.

On the twenty-seventh day of September, 1883, the court annulled the order of August 18, 1883, setting aside the judgment. This order, so far as appears, was without notice to Hyde or his attorney, and no action was taken in reference to the answer on file.

Defendant Hyde again, in August, 1886, upon petition duly

verified (and setting out most of the facts herein stated) showing that in 1872 he was a resident of the county of Alameda, etc., moved to set aside the judgment, and the motion being denied, brings this appeal.

1. It is apparent from the foregoing statement that the judgment is void for want of jurisdiction by the court of the person of defendants or of any of them: *People v. Mullan*, 65 Cal. 396.

2. A motion to set aside a judgment is a direct, and not a collateral, attack on such judgment; hence errors, which might be the subject of review on appeal therefrom, may be considered: *People v. Mullan, supra*.

3. The important question, however, is this: Can the superior court, after the lapse of a period of say twelve years from the entry of a judgment, set it aside, even if void?

In *Bell v. Thompson*, 19 Cal. 707, it was said: "We think it must be considered as settled in this state that no motion can be entertained by a district court to set aside a judgment on any ground, including that of want of jurisdiction over the person of the defendant in the action in which the judgment was entered, after the expiration of the term at which it was entered, unless its jurisdiction is saved by some motion or proceeding at the time, except in the case provided for by section 68 of the Practice Act."

The case referred to in the Practice Act is provided for by section 473 of the Code of Civil Procedure.

Under the former system of practice in this state, the decisions were numerous and quite uniform to the effect that upon the expiration of the term of court, all power to alter, change, modify, or annul judgments entered during the term, or prior thereto, was lost, unless saved by some motion or action of the court during the term, except as otherwise provided by statute. Under our present system of jurisprudence, terms of court are abolished; and as the rule cannot apply literally, it is provided by section 473 of the Code of Civil Procedure, above referred to, that the relief which formerly could be had during the term may be sought within a reasonable time, which is defined to be six months, except in cases where personal service of summons had not been had, in which cases the court may grant relief within one year.

In *Hastings v. Cunningham*, 35 Cal. 550, it was held that the rule indicated had no application, except to final judg-

ments, and did not apply while the proceedings remained *in fieri*.

So, too, it has been held that a judgment may be amended after the expiration of the term, where the record furnished the *data* for such amendment: *Hegeler v. Henckell*, 27 Cal. 495; *Bostwick v. McEvoy*, 62 Id. 502.

In *Savings and Loan Soc. v. Thorne*, 67 Cal. 53, a case in which the cause was tried by the court, and written findings were not filed or waived, this court, on appeal, upheld an order setting aside the judgment upon an application made more than six months after its entry, upon the ground that the case was not within the purview of section 473, *supra*.

In *Wharton v. Harlan*, 68 Cal. 422, it was held that the court may, after the expiration of six months, set aside a judgment by default, entered by the clerk, when it appears upon the face of the judgment roll that the clerk had no power to enter it. In such a case, it was said section 473 of the Code of Civil Procedure has no application.

It is conceded by all of the authorities that a court will interpose to stay the execution of a void judgment.

A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant.

It is said a court whose process is abused by an attempt to enforce a void judgment will interfere, for its own dignity, and for the protection of its officers, to arrest further action: *Mills v. Dickson*, 6 Rich. 487.

The most effectual method of doing this is by extirpating the judgment itself,—by removing a form which is without substance.

In New York, with a statute similar to section 473 of our code, the courts have held that the power to vacate a judgment is inherent, and is not limited by their code, which only has reference to ordinary defaults (*Dinsmore v. Adams*, 48 How. 274), and that the limitation does not apply to an unauthorized judgment, nor to a judgment entered without service of process: *Simonson v. Blake*, 20 How. 484; see cases cited in *Wharton v. Harlan*, *supra*.

In this last case, McKinstry, J., in commenting upon the rule enunciated in *Bell v. Thompson*, *supra*, said:—

"This technical rule as to action during the same term never applied to a pretended judgment in fact void, and could never have applied to statutory judgments entered by the clerk, which may be entered in vacation."

Section 473, Code of Civil Procedure, is intended to apply to cases where judgment has been taken against a party by mistake, accident, surprise, or excusable neglect; to cases in which the moving party must move upon evidence *de hors* the record; to cases in which the relief to be granted is largely in the sound discretion of the court, and has no application to a pretended judgment which is shown by the judgment roll to be void for want of jurisdiction, either of the person of the defendant or of the subject-matter.

In this instance, it is true, the applicant moved upon a petition duly verified, setting out the facts, but the notice of motion specified that it would be based "upon the ground that the papers on file in said action failed to show that any affidavit was filed therein stating grounds for the making of an order by said court for the publication of the summons in said action, or that any order by said court for the publication of said summons was ever made as required by law," and it was further stated that the "motion would be made on the . . . papers on file," etc.

The judgment roll is set out in the transcript, and the certificate of the judge, as well as the stipulation of the attorneys, show that it was used at the hearing.

By this roll it appears, as before stated, that there was no personal service on the defendants, or any of them, and as there is no sufficient affidavit that the summons was ever in fact published, the judgment is void, and should have been set aside, and a trial had upon the complaint and answer of Hyde on file, which answer was never stricken out or disposed of.

The order appealed from is reversed, and the court below directed to set aside the judgment in the cause rendered November 27, 1872.

THE PRINCIPAL CASE, following the decision in *People v. Mullan*, 65 Cal. 396, declares that a motion to vacate a judgment is not a collateral attack thereon; and hence, that on such motion papers may be considered and evidence heard which constitute no part of the judgment roll, and which are, perhaps, in direct conflict with that roll and the matters of record therein contained. In neither case is the question discussed, though it was necessarily decided in *People v. Mullan*, *supra*.

When the motion is made pursuant to section 473 of the Code of Civil Procedure of California, and like sections in other codes or statutes permitting persons to make applications for relief from judgments obtained against them by fraud, or through their mistake, inadvertence, or excusable neglect, there can be no doubt that "the parties are at liberty to contradict the record, and to establish, by any competent evidence, the truth of the facts upon which their claim to relief is based": Freeman on Judgments, sec. 109; *McKinley v. Tuttle*, 34 Cal. 235; *Mosseux v. Bingham*, 19 Vt. 457. In such cases the statute, in effect, grants the moving party a time specified within which to ask for relief against a judgment which, unless such relief be granted, is binding upon and enforceable against him; and, for the purposes of the motion, it exempts him from the operation of the general rule in force in many of the states, that the question of jurisdiction must be determined by the record.

The principal case, however, did not fall within the provisions of section 473. It was a case in which the defendant sought relief, not as a matter of grace, or discretion, but of undeniable right, on the ground that the court had never obtained jurisdiction over him, and had, therefore, no power to enter judgment against him.

It may be that the judgment in the principal case was void, and had no greater elements of strength to resist a collateral assault than it had when assailed directly. That such was its character in many states, and in the national courts, we have no doubt. The courts of California have gone further than any other in sustaining judgments from collateral assault, in holding that questions of jurisdiction must be settled by the record, and that from the record must be excluded all papers and matters which the statute does not declare to be a part of the judgment roll: *Hahn v. Kelly*, 94 Am. Dec. 742. Taking this case in connection with the principal case, it follows, in this state, that while a judgment might be affirmed on appeal, because the judgment roll did not show any defect in obtaining jurisdiction, such judgment might be vacated on mere motion, supported by evidence not to be found in the judgment roll.

It seems remarkable that courts should take such extreme grounds to protect judgments from collateral assault, in the interests of innocent purchasers and others claiming title thereunder, and yet leave those interests exposed to mere motions to be made in the original case at any time.

The one remarkable feature of judicial controversy as to whether and when judgments may be collaterally assailed is, that there has been little or no discussion of what is a collateral assault. But for the principal case, and *People v. Mullan*, *supra*, we should judge every assault upon a judgment to be collateral which was not made either upon appeal, motion for a new trial, or motion for relief made during the term at which the judgment was rendered, or if, after the lapse of such term, then within the time and for the causes designated by statute.

The importance of the question, what is a collateral assault, when a judgment is assailed for want of jurisdiction, has been greatly diminished by the more recent decisions, the general tenor of which, as we apprehend, is, that the force of a judgment, whenever and wherever it is sought to be enforced, may be destroyed by showing that the court had no jurisdiction over the defendant. In other words, an attack upon the jurisdiction is equally efficient, whether collateral or direct: *Belcher v. Chambers*, 53 Cal. 639; *Galpin v. Page*, 3 Saw. 93; 18 Wall. 350; *Pennoyer v. Neff*, 95 U. S. 714.

JUDGMENT IS NULLITY UNLESS IT IS SHOWN THAT THE PARTIES were either actually or constructively served with notice: *Martin v. Williams*, 97 Am. Dec. 456; and one against whom judgment has been rendered without service, or over whom the court never acquired jurisdiction, is entitled to have the judgment set aside: *Dobbins v. McNamara*, 3 Am. St. Rep. 626.

VOID JUDGMENT MAY BE VACATED BY COURT WHICH RENDERED IT, at any time, and notwithstanding lapse of time: *Olney v. Harvey*, 99 Am. Dec. 532, and note citing other cases.

PROPER MODE OF STAYING EXECUTION WHICH ISSUED ON VOID JUDGMENT is by motion to set the execution aside: *Luco v. Brown*, 2 Am. St. Rep. 772, and note.

DE SEPULVEDA v. BAUGH.

[74 CALIFORNIA, 468.]

JUDGMENT IN FORECLOSURE, DESCRIPTION OF LAND IN. — Where the description in the mortgage, judgment of foreclosure, and sheriff's deed is of a tract by metes and bounds, "excepting, however, those portions of the above-described tract which are described in those certain conveyances executed by the party of the first part hereto, which are recorded respectively (giving the books and pages of the county records), to which deeds and the records thereof reference is hereby made for further description, the remainder of the tract which is hereby conveyed containing about 719 acres," the judgment and deed are not void. *Crosby v. Dowd*, 61 Cal. 557, *contra*, is here overruled.

ACTION to quiet title. The defendants deraigned title through a foreclosure sale, which the plaintiff insisted was void for defects in description, which are stated in the opinion. Judgment for the defendants.

H. M. Smith and W. H. Clark, for the appellant.

Chapman and Hendrick, Graves and O'Melveny, and Bicknell and White, for the respondents.

TEMPLE, J. This case seems very plainly to be within the rule laid down in *Crosby v. Dowd*, 61 Cal. 557.

A tract of 909 acres is described by metes and bounds, "excepting, however, those portions of the above-described tract which are described in those certain conveyances executed by the party of the first part hereto, which are recorded respectively in book 22 of deeds, page 477, book 32 of deeds, page 113, book 36 of deeds, page 446, and book 48 of deeds, page 466, records of Los Angeles County, to which deeds and the records thereof reference is hereby made for further description; the remainder of the tract which is hereby conveyed containing about 719 acres."

This description is in the mortgage, complaint on foreclosure, the decree, sheriff's certificate, and deed, and nowhere except by the above reference is there any description given of any of the excepted tracts.

The record of the foreclosure therefore contains no description from which it can be ascertained without such reference, no matter how familiar one might be with all the descriptive calls given as to any specific portion of the described land, whether or not it was conveyed by the mortgage deed, or whether the decree is operative upon it. Nor could he tell whether any portion of the metes and bounds of the nine-hundred-acre tract remains as any portion of the metes and bounds of the seven-hundred-acre tract.

This case is attempted to be differentiated from *Crosby v. Dowd, supra*, in this: In *Crosby v. Dowd* the only description of the property in the complaint or decree was a reference to three deeds in the recorder's office. Here the mortgage, complaint, decree, certificate of sale, and sheriff's deed, alike described a large tract of land by metes and bounds, excepting therefrom certain sold portions as above stated; that is, in the former case reference is made to the record for a description of the land mortgaged, while in the case at bar reference is made to the records for a description of certain portions of the described tract which are excepted from the effect of the mortgage and decree.

A mere statement of this contention would seem to go a long way toward answering it. There is evidently the same indeterminateness in regard to this description as in the other, and the sheriff would be no better able to find the land, or to determine what lands he should put a purchaser in possession of. And there is the same possibility that when the deeds were examined they would be required to be construed by a court to determine what lands were included.

Nor can it be construed as to the intent of the mortgagor in the larger tract better than in *Crosby v. Dowd, supra*, which was described as a portion of the Santa Rita rancho.

By express statement she did not mortgage her interest in the entire tract, and the judgment does not profess to operate upon her interest in the entire tract. The judgment record, therefore, is not complete, but other documents not in the record must be referred to to ascertain what is the subject-matter upon which the decree operates.

But I am of the opinion that *Crosby v. Dowd, supra*, ought

not to be allowed to stand. I think I have examined all the cases cited in support of the decision by counsel or by the court, and I fail to find any authority for holding the judgment void upon a collateral attack. It may be admitted that such a decree is erroneous, and will be corrected if the attention of the court is called to the defect by demurrer or proper motion, or by appeal.

Such an amendment would be in the interests of justice, and for the interest of both parties: for the mortgagor, that the property sold with a good description may bring a better price, and his debt be paid; for the mortgagee similarly, that he may collect his money. For these reasons, as well as that the writ may contain specific directions to the officer, who is required at his peril to execute it, the record of the foreclosure should contain a perfect description of the property. If, when a writ is issued, it is found that it fails to describe any property, the sheriff may refuse to execute it, or the court, upon application, may quash it, and restore the party, if he has been dispossessed.

But for what reason is the judgment void? Certainly not for lack of jurisdiction, either as to the subject-matter or the person. What nullity known and recognized by established rules of law is found in this judgment? If any, it must be because it is a proceeding to establish a lien, and there is no description of the thing to which the lien attaches. But by established rules of evidence, such a reference is not meaningless, and does furnish a description of the thing. It is admitted that it is sufficient, and does amply describe the thing in the mortgage. But it is said that a deed is evidentiary, and may be helped out by other evidence, while a decree is final and determinative. The distinction is illusory; but admitting the difference, it has no bearing upon this question.

The judgment is held void simply because it is meaningless. This distinction admits that it is not meaningless, but declares that it is not sufficiently explicit for the convenience of the court or its officer.

Plainly the judgment is not void for the want of a description which identified the subject upon which the judgment is to operate. But the rule is unsafe, and the distinction illusory.

Here it may be well to call attention to the fact that very few of the cases cited as authority are cases like this, where the objection was, that the description contains an express reference to another document, which must be examined to

help out the description. Most of them were cases where, on its face, the description was indefinite or defective, and were actions for the recovery of specific property.

The trouble is said to be that the sheriff may not know with certainty what land he is to place the purchaser in possession of. The same uncertainty may, and generally will, exist where metes and bounds are given. The court says, assuming that the records can be found, the descriptive calls may be found indefinite, so as to render it impossible to locate them. So, too, any landmarks called for may, for aught the court can ordinarily know, be impossible of location. The call for a pile of rocks on the bank of a creek may be very uncertain, while the reference to the deed may be definite and clear.

But in a very large class of cases where metes and bounds are given, it still becomes necessary to refer to deeds and to records to locate the boundaries. What is the practical difference between the case at bar and one in which a description giving metes and bounds describes the boundary as beginning at a stake at the northeast corner of the land conveyed to Smith by Brown, by deed executed so and so, or a line running north to the southern boundary of Brown's land?

Or what is the difference between this and a description as lot 2, in section 2, etc., according to the United States land surveys? The lot could not be found without referring to the plat in the land-office. The same is true of a description of a quarter-section of land, according to the system of United States land surveys. We take judicial notice of the system, but not of the actual surveys, and we know that in many places there are wide departures from the general system. The plat must be referred to to find the particular quarter-section. Then land is often described by reference to town plats, sometimes where the plat has not become a public record, and the streets and lots only exist on paper. The plat must be found to locate the land. Farms are sold by reference to subdivision maps of large ranches. Now, is this court to hold that all judgments which describe the land by reference to these things are void? Yet in every one of these cases the descriptions show on their face that some other document is referred to, and must be examined to make out the description.

I cannot see how a judgment can be pronounced a nullity for uncertainty of description, unless the court can see that

nothing is described. But here the description is not even uncertain or doubtful. It simply does not come up to some ideal standard laid down by the courts as more convenient for them and their officers. The true rule would seem to be that the judgment is not void; that the purchaser must, however, rely upon the description, and if it be found so defective when tested by rules of evidence ordinarily applied to the subject that nothing can be found, he will fail; otherwise he should recover.

I admit that the case of *Crosby v. Dowd*, *supra*, was very maturely considered, and that it should not be overruled unless plainly wrong. However, it is one of those decisions under which no rights can have grown up; and I think the rule mistakenly laid down exceedingly mischievous. A sense of justice will, I think, if the case be not overruled, impose upon this court the labor of differentiating case after case from that.

I think the judgment should be affirmed.

WE REPORT THE PRINCIPAL CASE with especial pleasure because it overrules the cases of *Hill v. Ware*, 66 Cal. 130, and *Crosby v. Dowd*, 61 Id. 557. The latter case was very fully considered, one or more rehearings having been granted before the final decision was reached. Among other authorities cited by the court is Freeman on Judgments, sec. 54. The author of that work has never been able to understand that the language employed by him in that section gave any support to the view that the descriptive parts of a decree, judgment, or sheriff's deed need be any more perfect in themselves, or are to receive any other construction, than like parts of other conveyances. It is by no means essential that, from a mere inspection of the description, the court should be enabled to know what lands are intended. The tract may be designated by some name not understood by the court, but perfectly familiar to all persons acquainted with the neighborhood in which the land is situated. Evidence may always be received to show the signification of such a name, or to show that any other descriptive words, though apparently meaningless or uncertain, do in fact designate a particular tract in such a manner that its identity would be apparent to persons with whom it is familiar: Freeman on Executions, sec. 281; *McPike v. Allman*, 53 Mo. 551; *Marshall v. Greenfield*, 8 Gill & J. 349; 29 Am. Dec. 559; *Webster v. Blount*, 39 Mo. 500.

The deed, and in the case of a judicial sale, the decree and order of sale, may refer to some other paper or to some record for the purposes of description, so that it is necessary to read the paper or record referred to to ascertain what has been sold and conveyed. Such references are not unusual in voluntary conveyances; and we believe deeds which, but for them, would be meaningless, have always been sustained, the description referred to being very properly treated as if copied into the deed. A sheriff's deed may be made certain by showing what lands the defendant owned: *Colcord v. Alexander*, 67 Ill. 583; or by referring to the mortgage under which the sale was made: *Key v. Ostrander*, 29 Ind. 7. If the county in which the lands are

situate is not named, they will be presumed to lie in the county in which the judgment was entered and the sale thereunder made: *Billings v. Kankakee*, 67 Ill. 490.

The descriptions employed in *Crosby v. Dowd*, *supra*, referred to other instruments then on record, giving the dates and places of record, for the purposes of description. Upon looking at these instruments or records, and regarding the descriptions therein given as copied in and made a part of the decree in *Crosby v. Dowd*, *supra*, its descriptive parts ceased to be meaningless or ambiguous, and became not only certain, but capable of being readily understood. We know of no rule of law, and no considerations of public policy or expediency, which require courts, in reading the decrees or judgments of other courts, to refrain from considering, not only all the descriptive words therein, but also any reference which may be made to other public records for the purposes of description. That which a court understands, or may be enabled to understand, in a deed, ought not to be treated as meaningless in a judgment.

We concede that, in judicial proceedings which may result in the involuntary divesting of an estate, everything ought to be made so very clear and certain as to attract immediate attention to the property to be sold, so that even a casual observer might at once know what it is that he may have the privilege of bidding upon. Every decree and notice of sale ought, therefore, to be perfect in itself, or as nearly so as possible. To make it otherwise is to commit an error in the exercise of existing power which ought to be corrected in some appropriate mode; but it is not a passing so far beyond the limits of the power as to render the act nugatory, and its correction unnecessary.

Since the decision in the principal case, we have no doubt that a judgment, decree, order of sale, and deed made in pursuance thereof, may each or all refer to another record for the purpose either of describing a tract of land, or of showing what parts thereof, if any, are intended to be omitted from such description.

DE HALEY v. HALEY.

[74 CALIFORNIA, 489.]

ACTION FOR DIVORCE ON THE GROUND OF CRUELTY COMMITTED BY HUSBAND, IN A PRIOR ACTION, by charging his wife therein with unchastity prior to her marriage with him, cannot be sustained while such former action remains undisposed of, if the charge made by the husband in that action was material therein, because, if material, the issue formed thereby must be first tried in the action wherein the charge was made.

CROSS-COMPLAINTS IN ACTIONS FOR DIVORCE. — The court doubts whether the codes permit cross-complaints in actions for divorce; and intimates that while recriminatory matter may be shown by defendant as a bar to plaintiff's cause of action, it may not be the basis of affirmative relief.

S. Haley, in propria persona, and *David Lyon*, for the appellant.

Hupp and Glowner, for the respondent.

McKINSTRY, J. The court below should have sustained the demurrer to the complaint.

The action is for divorce. The complaint avers the defendant was guilty of extreme cruelty, in that, in another action, brought by her against him, he filed an affidavit containing statements of want of chastity on her part prior to their marriage; and in that, in an action brought by him against her, he filed a complaint charging that prior to the marriage of these parties she was pregnant by another man. The complaint herein avers that the statements of defendant in the affidavit and complaint referred to were wholly false and malicious.

The complaint herein does not directly state the character of the two actions mentioned, or of the issues made by the pleadings in either. It may, however, be inferred from the allegations as a whole that both were actions for divorce,—the one brought by the plaintiff, the other by the defendant herein.

The complaint does not show what was the particular motion, application, or proceeding in which the affidavit was filed, nor does it appear therefrom; but the statements in the affidavit were relevant and material to the issue presented on the motion, application, or proceeding.

There is no averment that either the action brought by the plaintiff, in which the affidavit was filed, or the particular proceeding in such action in which the affidavit was filed, has terminated adversely to the present defendant, or terminated at all. And there is no averment that the action brought by the defendant herein against the present plaintiff has come to an end in any way.

1. While the action brought by the wife for a divorce was pending, and the proceeding in such action, in which the affidavit of the husband was filed, was undetermined, could the wife bring the present action, charging as an act of extreme cruelty the making by her husband of the statements contained in the affidavit?

2. While the action for divorce brought by the husband (defendant herein) against his wife (plaintiff herein) was still pending and undetermined, could the latter commence the present action, and rely, as ground for divorce, upon statements contained in the complaint of the husband showing fraud by the present plaintiff in the contracting of the marriage?

The averments of the complaint in the action brought by the present defendant against the plaintiff herein were proper in themselves, and if true, may be the basis of a decree for divorce. Whether true or not true may be the issue in that action. The present plaintiff cannot, by alleging that the averments of the defendant to the other suit are false and malicious, transfer to the present action the trial of the issue of their falsity. In the action brought by the defendant, it may be adjudicated that the averments of his complaint are true. The orderly administration of the law demands of us to hold that this action was, at least, commenced prematurely. This appears on the face of the complaint, and the objection could properly be taken by general demurrer.

Suppose a divorce should be sought by a wife on the ground of desertion, and the husband should file "a cross-complaint" charging her with adultery; would it be contended that while the suit was pending she could commence and maintain another action for divorce upon the ground that the counter-charge was "false and malicious"? To permit the trial by anticipation in a new action of an issue in an action already pending would lead to confusion, and perhaps to contradictory adjudications, since the evidence might not be the same at both trials.

True, in the present action the allegation is, that the averments of the complaint in the action brought by the husband were not only false, but malicious. In the action brought by the husband, the truth of the averments made by him could alone be in issue; if true, his malice in making them would be an immaterial circumstance. But the averment in the present complaint includes the question of the falsity of the husband's allegations. However much malice may have entered into the action of the defendant, the plaintiff could not recover in this action unless she proved his averments in the suit brought by him to be false.

The objection to the present complaint as to the averments of the defendant in the action brought by him applies also to the allegations of the present complaint, with respect to the relevant and pertinent statements on the defendant's affidavit filed in the action first commenced by her.

It may not be improper to remark that it is at least doubtful whether the codes provide for a cross-complaint in actions for divorce.

"Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce": Civ. Code, sec. 122.

An action for divorce is not brought on the "contract" of marriage, but upon certain violations of duties or obligations annexed to the *status* of matrimony, which are enumerated in section 92 of the Civil Code as causes for which a divorce may be granted. Recriminatory facts should be pleaded, but it would seem they are pleaded and proved as a defense simply, and in bar of the plaintiff's cause. When, in bar of an action for divorce, the defendant pleads the commission by the plaintiff of any of the wrongs mentioned in section 92 of the Civil Code, and prays for a divorce, does he seek affirmative relief "relating to or depending upon the transaction upon which the action is brought"? If not, section 442 of the Code of Civil Procedure does not apply to actions for divorce.

Nor is there any general principle, independent of the code, which authorizes a cross-complaint in actions for divorce "to prevent multiplicity of suits." The statutes regulate the matter in other cases, and the law does not so especially favor actions for divorce as to make them exceptions to a rule otherwise uniform.

Judgment reversed, and cause remanded, with direction to the court below to sustain the demurrer to the complaint.

THE PRINCIPAL CASE is quite important in its intimation that there can be no cross-complaint in actions of divorce under section 442 of the Code of Civil Procedure of California. That section is as follows: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court, subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint."

OFFENSES SPECIFIED IN CALIFORNIA CODE AS GROUNDS OF DIVORCE are properly pleadable in bar one to the other: *Conant v. Conant*, 70 Am. Dec. 718.

ESTATE OF ROWLAND.

[74 CALIFORNIA, 523.]

IN THE DISTRIBUTION OF AN ESTATE, PERSONS CLAIMING ADVERSELY to the decedent cannot present their claims and have property in the hands of the administrator turned over to them, on the ground that it belonged to them and not to decedent.

HUSBAND, ON SETTLEMENT AND DISTRIBUTION OF WIFE'S ESTATE, cannot obtain an order that certain moneys in the hands of the administrator be turned over to him as community property.

DISTRIBUTION OF WIFE'S ESTATE CANNOT PREJUDICE HUSBAND'S CLAIM that property which the decree of distribution purports to distribute was in fact community property, and belonged to him as the survivor of the community, for the court has no jurisdiction over such property in administering the estate of the wife.

M. G. Cobb and John Reynolds, for the appellant.

A. N. Drown, for the respondents.

SEARLS, C. J. This is an appeal from a final decree of the superior court distributing the estate of Jane Rowland, deceased, and denying the petition of appellant, the surviving husband of deceased, to have certain money and property in the hands of the executors, declared community property of petitioner and deceased, segregated from the separate property of the testatrix, and delivered to him, instead of being distributed to the legatees under the will.

It appears from the petition of the appellant, to which a demurrer was interposed and sustained, that in 1867 the petitioner and testatrix, who were husband and wife, by an agreement between themselves, divided their community property; that twelve thousand dollars of such property was in the hands of the testatrix, and was not divided, owing to the fact that petitioner supposed it was required to pay off certain claims against the common property.

The property thus divided and thereafter held by the parties in severalty as their separate property was sold in 1879 for one hundred and eighty-five thousand dollars, and thereupon an accounting was had between the parties, in which petitioner claims the testatrix was improperly allowed five thousand dollars on account of alleged expenses incurred by her as the agent of petitioner in and about his property. He now claims these amounts with interest, amounting in the aggregate to thirty thousand dollars, as community property, to which he was entitled upon the death of his wife.

Deceased left a will, which was duly admitted to probate,

whereby her property was disposed of, and in which petitioner was a legatee to the extent of one dollar.

It is made the duty of the probate court, or the superior court acting as such, to distribute the estate of deceased persons, when ready therefor, to the heirs, legatees, and devisees, as the case may require and as provided by law; so, too, debts and demands against the estate may be ascertained, determined, and paid as provided by statute.

The law does not contemplate or provide for the distribution of property or money in the hands of the executor or administrator to persons who may claim adversely to the estate, but leaves all such questions to be determined by action on behalf of or against the executor. The estate as distributed must go to the heirs or legatees or devisees, or to some of them, or those holding under them, and the decree, when made, is conclusive as to their rights, subject only to be set aside, modified, or reversed on appeal: Code Civ. Proc., sec. 1666.

Appellant does not claim under or through the estate, but adversely and in opposition thereto.

"Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband," etc.: Civ. Code, sec. 1401; *Moore v. Jones*, 63 Cal. 12.

Under the eleventh section of the act of 1850, upon the death of the wife, one half of the community property vested in her descendants: *Payne v. Payne*, 18 Cal. 291.

The amendment of 1874, contained in section 1401, quoted above, has changed the rule in this respect; and as to the community property, the husband does not, upon the death of the wife, take by succession. The estate in expectancy of the wife in the community property is dependent upon her survivorship; and in the event of her death before her husband, it is deemed never to have existed. If we are correct in this, the husband does not, upon the death of his wife, as to the community property, take by descent or succession, but holds the community property as though acquired by himself, and as if his deceased wife had never existed.

The contention of counsel for appellant, that the claim of the latter will be concluded by the decree of distribution, is not tenable. Under section 1666, Code of Civil Procedure, the decree is only made conclusive as to the rights of heirs, legatees, and devisees. As appellant does not, as to the claim, come within the category of these, he will not be bound thereby. He appears in a twofold capacity: 1. As a legatee

under the will, and as to his rights as such he will be bound by the decree; and 2. As a claimant, in his own right, antagonistic to the estate. In this latter capacity he will be no more concluded than a third party would be, who might chance to claim real estate adversely to decedent and his representatives: Freeman on Judgments, sec. 66, and cases cited; *Bath v. Valdez*, 70 Cal. 359. If, as may well be, his demand only amounts to a claim against the estate, which should have been presented to the executors, it cannot alter the case as presented here.

The decree and order of the court below appealed from are affirmed.

COMMUNITY PROPERTY, GENERALLY: See the note to *Cooke v. Bremond*, 86 Am. Dec. 628 et seq.

ESTATE OF RADOVICH.

[74 CALIFORNIA, 536.]

EXECUTOR WHO SELLS PERSONAL PROPERTY OF HIS TESTATOR, WITHOUT AN ORDER OF COURT, is guilty of its conversion, and becomes responsible for its value, with legal interest.

EXECUTOR WHO HAS RESIGNED HIS TRUST, SETTLED HIS ACCOUNTS, AND RECEIVED HIS DISCHARGE, MAY, NEVERTHELESS, BE CITED before the court by his successor, under section 1629 of the Code of Civil Procedure of California, and required to account for property converted by him and not included in his former accounts.

EXECUTOR HAS NO RIGHT TO GIVE AWAY STOCKS because he regards them as worthless.

MEASURE OF EXECUTOR'S LIABILITY FOR STOCKS, WHICH HE HAS PERMITTED TO BE SOLD without an order of court, is not limited to their appraised nor to their actual value, but extends to the amount for which they were sold, where that exceeds the appraised or actual value.

ORDER MADE AT THE INSTANCE OR TO PROMOTE THE INTEREST OF APPELLANT will not be reviewed on an appeal taken by him.

A. D. Splivalo, for the appellant.

A. Comte, Jr., for the respondent.

BELCHER, C. C. In 1870, S. Martinovich was duly appointed executor of the last will and testament of L. Radovich, deceased, and he continued to act as such executor until August, 1882. Among the assets of the estate which came into his possession as executor was a certificate for five shares of the capital stock of the San Francisco and Oakland Railroad Company. This stock was mentioned in the inventory, and was

appraised at \$250. Martinovich resigned his place as executor in 1882, and J. L. Radovich was appointed administrator of the estate with the will annexed.

Martinovich never obtained any order for the sale or disposition of the stock, and never turned the certificate over to his successor. Subsequently, in March, 1885, Radovich, as administrator, obtained an order from the court requiring Martinovich to appear and render an account under oath of the five shares of stock which he had received and held as executor.

To this order Martinovich answered, denying that, as executor or otherwise, he ever received the five shares of stock referred to, and alleging that at the time of L. Radovich's death, the stock was, and ever since had continued to be, worthless, and of no value whatever.

A hearing was had before the court, at which Martinovich appeared and testified that he was executor of the last will of L. Radovich, deceased, and that, prior to November 28, 1873, as such executor he had the control and possession of the said five shares of stock as a part of the assets of the estate, and "that he had indorsed the stock as such executor, and had delivered the same to A. D. Splivalo, his attorney and agent, to sell it for whatever he could, and that witness, as such executor, had filed accounts, but had never accounted for said stock, or the proceeds of sale thereof, and that he had been allowed by the court in his accounts and had received from the estate all his commissions, disbursements, and charges, and claims of all kinds, including attorney's fees in matter of said estate, and that nowhere and in no manner had he accounted for said shares of stock, but had omitted all mention thereof in his accounts, as he did not consider them of any value; that he had never applied to the court for authority to sell the stock, and that his indorsement of the same and the delivery of the same to said Splivalo was without order from court."

Splivalo was called as a witness, and testified "that he had been attorney for the estate of L. Radovich, deceased, . . . and that said Martinovich had indorsed the stock as executor, and told him to sell it for what he could get and keep it for his services; that the stock was not indorsed by any other person than the said Martinovich; that the stock was considered of no value whatever, but that witness sold it for \$450 some time prior to November 28, 1873; that \$450 was not its value, although he got that sum for it; that the stock had no value; that he received the stock as part compensation for his

services in said estate; and that if it were not credited in the accounts, it was through forgetfulness."

The court found, among other things, that the five shares of stock were indorsed and sold without any order of court, and were transferred to the purchaser thereof on the books of the corporation on the twenty-eighth day of November, 1873; that the stock was sold for \$450, and that that sum was its market value at the time of sale; that neither the stock nor the proceeds of the sale thereof were ever accounted for by Martinovich prior to the filing of his account in May, 1885, and that there was no good or any sufficient cause for his delay in accounting for the same.

Thereupon an order was made and entered, settling the account at \$450, with legal interest thereon from November 28, 1873, in the aggregate, \$828.92, and requiring Martinovich forthwith to pay the last-named sum to the administrator of the estate.

Subsequently, on motion of counsel for Martinovich, an order was made modifying the last-named order in certain unimportant particulars, and thereupon Martinovich appealed from both orders.

1. We fail to see that the court erred in making the first order complained of. As executor, Martinovich had no right to sell or otherwise dispose of the stock without an order of court authorizing him to do so. When, therefore, without any such order, he caused the stock to be sold, he, in legal effect, converted it to his own use, and became responsible for its value, with legal interest thereon.

The claim that the court had no jurisdiction to make the order because Martinovich resigned his trust as executor in 1882, and then settled his accounts and was discharged, is not tenable, for two reasons: 1. The code provides that "when the authority of an executor or administrator ceases, or is revoked for any reason, he may be cited to account before the court at the instance of the person succeeding to the administration of the same estate," etc.: Code Civ. Proc., sec. 1629; and 2. It affirmatively appears that he never accounted for or was discharged from the liability in question.

So the claim that the stock was considered worthless, and the appellant therefore rightfully turned it over to Splivalo, attorney for the estate, is equally untenable.

The executor has no right to give away the assets of the estate even though he may consider them worthless, and the

attorney has no right to receive such a gift from the executor's hands. Both parties knew, or should have known, such to be the law when the transfer was made.

So, too, the claim that appellant, if chargeable at all, should have been charged with only \$250, the appraised value of the stock, is wholly without merit. The code makes the executor chargeable with the whole of the estate at the appraised value, and with all the interest, profit, and income thereof, and it requires him to account for the excess when he sells any part of the estate for more than the appraisement: Code Civ. Proc., secs. 1613, 1614. As the stock was actually sold for \$450, the appellant was properly chargeable with that sum, with interest thereon.

2. The appeal from the second order cannot be considered, for the reason,—1. It was made at the instance of appellant; and 2. It was made to promote his interests, and could not possibly operate to his prejudice.

We conclude, therefore, that both of the orders appealed from should be affirmed.

The COURT. For the reasons given in the foregoing opinion, the orders are affirmed.

PARTY WILL NOT BE HEARD TO COMPLAIN OF AN ORDER MADE AT HIS INSTANCE: *Price v. Brackenridge*, 92 Mo. 378.

SECTION 1629 OF THE CODE OF CIVIL PRECEDURE, referred to in the opinion, is as follows: "When the authority of an executor or administrator ceases, or is revoked for any reason, he may be cited to account before the court, at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator."

Doubtless this section confers plenary power to compel an accounting in proper cases; but we see nothing therein which appears to be designed to limit or annul the operation of previous judicial proceedings, or to render inapplicable the law of *res judicata*. In the principal case it appears that the executor had accounted, and his accounts had been settled. Such settlement was a decision, and apparently a final decision, upon a matter within the jurisdiction of the court, and was, therefore, upon principle, conclusive that the amount then found to be due from the executor was the true amount. Any subsequent proceeding to show that such amount was either greater or less was inconsistent with the prior adjudication, and therefore not permissible: *Freeman on Judgments*, secs. 284 a-287. The settlement relied upon as a bar in the principal case was apparently the settlement of a final account, and there was no suggestion that the proceedings resulting in such settlement were without notice, or irregular in any respect. The decision seems, therefore, indefensible upon principle, and in defiance of the Code of Civil Procedure and the prior decisions of the court: *Cal. Code Civ. Proc.*, sec. 1657; *Reynolds v. Brumagim*, 54 Cal. 254; see also note to *Picot v. Biddle's Ex'r*, 86 Am. Dec. 143-146.

KELLY v. CENTRAL PACIFIC R. R. Co.

[74 CALIFORNIA, 557.]

FRAUD IN OBTAINING A CONTRACT WILL DEFEAT THE RIGHT TO COMPEL A SPECIFIC PERFORMANCE THEREOF, although the fraud was not productive of injury to the defendant. It is sufficient that it would result in an injury to third persons, as where one by fraudulent representations procured a contract for the sale of lands to him, which contract, but for such representations, would have been given to another.

FRAUD WILL DEFEAT A SUIT FOR SPECIFIC PERFORMANCE of contract to convey lands, though such fraud was not productive of damage to the vendor or to third persons, if by the fraud the vendor was deceived and caused to enter into a contract to which his assent could not have been otherwise obtained.

SPECIFIC PERFORMANCE WILL NOT BE DECREED UNLESS THE CONTRACT IS FREE FROM EVERY IMPUTATION OF FRAUD OR DECEIT. The contract of the party seeking specific performance must be free from all blame.

J. M. Fulweiler, and Hart and White, for the appellant.

A. P. Catlin, and C. A. and F. P. Tuttle, for the respondent.

HAYNE, C. Action for specific performance of a contract to convey land.

The Central Pacific Railroad Company, being the owner of large tracts of land acquired from the federal government, placed the disposition of the same in the hands of one of its officers, called its land agent. The finding in this regard is, that "said railroad company, for the purpose of disposing of its lands, established a land department and appointed a land agent, who had power to issue and carry into effect the circulars hereinafter copied. Said land agent had full power to appoint subordinate agents, and to distribute to them the work of the land department."

In the exercise of his functions, the land agent addressed a circular to the public inviting settlement upon its vacant lands, and stating, among other things, that "settlers and actual occupants who in good faith cultivate and improve lands belonging to either of the companies will generally be given preference of purchase at the regular price."

It appears that in the spring of 1881, one Menger, who was then in occupation of the south half of the northeast quarter of section 7, in township 13, range 9 east, Mount Diablo base and meridian, and of an adjoining piece, received the above-mentioned circular, and certain verbal assurances, and after several months sold and conveyed whatever rights he had to one Cole. Before making the purchase, Cole inquired of one

Perkins, the deputy of the land agent, "whether, if he bought from Menger, he could get the title of the company" to the said south half of the northeast quarter, and the other land which Menger occupied. And Perkins "then gave him one of said circulars, and informed him that if he moved upon the land and improved it, he could safely buy of said Menger, and that the railroad company would give him the preference to buy the same at such price as it might fix; and said Cole made said purchase under said advice, and moved into said Menger's house immediately upon the purchase. . . . Said Cole moved upon said land, and continued to reside upon it and make improvements on it, relying upon said circulars, and what was said to him by said Perkins, believing that he would have the prior right to purchase from said railroad company said land at a price which it might fix." In December, 1881, he filed his application to purchase with the land agent; but no immediate action appears to have been taken thereon.

During all of this time the plaintiff, Kelly, had brought himself within the terms offered by said circular as to certain adjoining land, but had never done so as to the land in controversy. It sufficiently appears, we think, that Kelly had notice of Cole's equities; for he resided in the vicinity, and it is found that on one occasion he undertook to make an entry upon Cole's possession, and commenced to erect "a small board house" upon the land in controversy; but Cole ordered him off; and he left, and moved his house away. He therefore knew that Cole had a claim to the land, and by inquiry he could easily have learned the nature of such claim.

Several weeks after this, Kelly filed with the land agent an application to purchase certain lands, including the tract in controversy, and represented to the land agent that he, Kelly, had settled upon the same. The land agent, believing these representations, entered into a contract with Kelly for the conveyance to him of this and other tracts, and received from him the first payment therefor. These representations of Kelly were entirely false. The finding in this regard is as follows: "Kelly's said representations, made by himself and his witnesses to the land agent, were untrue, and he at the time knew that they were untrue, and they deceived the land agent, and induced him to award to said Kelly said south half of the northeast quarter; and the land agent, but for such deception, would not have awarded said south half of the northeast quarter to said Kelly, but would have awarded it to said Cole."

Upon becoming aware of the deception which had been practiced upon him, the land agent notified Kelly that he could not have the tract in controversy, and tendered him back the portion of his first payment which applied to that tract; but did not tender him back the money applying to the other lands mentioned in his contract. Kelly refused to receive the money, and brought this action to compel the conveyance to him of all the land mentioned in the contract. Cole intervened, and prayed for the conveyance of the land in controversy to him. The court below decreed that the land be conveyed to Cole, and Kelly appeals. The evidence is not brought up,—the appeal being from the judgment, and upon the judgment roll alone.

The point made on Kelly's appeal is, that the false representation was not productive of injury to the railroad company. And the argument is, that there was no injury, because, in the first place, it was under no obligation to convey to Cole,—the promise contained in the circular being merely that "preference will generally be given to settlers," in which respect it differs from the promise contained in the circular considered in *Boyd v. Brinckin*, 55 Cal. 427; and because, in the second place, the company was willing to convey, and will convey, the land to Cole for the same price that it agreed to convey it to Kelly, and hence could not be injured pecuniarily.

It is deserving of serious consideration whether, admitting that *Boyd v. Brinckin*, *supra*, can be distinguished as contended, there was not sufficient part performance of the oral promise to Cole to take the case out of the statute of frauds and entitle him to a specific performance. But waiving this, we think there are two answers to the argument for the appellant.

1. Assuming the correctness of appellant's major proposition,—viz., that in order to defeat a suit for specific performance on the ground of fraud, the fraud must be productive of injury,—it is not necessary that the injury should result to the vendor. It is sufficient if it would result to third persons. It is upon this principle that the relief is refused where the thing to be done would operate as a fraud upon the public. Thus a court will refuse to decree specific performance of an agreement to publish a book, purporting to be written by one person, but in fact written by another: *Post v. Marsh*, L. R. 16 Ch. D. 406. So, upon the same principle, the relief is refused where the agreement was in fraud of the rights of creditors:

St. John v. Benedict, 6 Johns. Ch. 117; *Baldwin v. Campfield*, 8 N. J. Eq. 600; *Ryan v. Ryan*, 97 Ill. 40; or in fraud of the rights of other parties: *Kitchen v. Coffyn*, 4 Ind. 507. So it is refused where the act sought to be enforced would operate to the injury of interests in remainder: *Fry on Specific Performance*, p. *141, sec. 304; *Thomas v. Dering*, 1 Keen, 747, 748; or to a wife's right in a homestead: *Phillips v. Stauch*, 20 Mich. 383; or to subsequent purchasers from the same vendor: *Curran v. Holyoke*, 116 Mass. 90; and see *Pomeroy on Specific Performance*, sec. 181. The court will not make itself an instrument to carry out the fraud, whether the person to be injured be a party to the contract or not. It will not assist the plaintiff to get the benefit of the intervenor's labor and improvements upon the tract in controversy.

2. But we do not think that in order to defeat a suit for the specific performance of a contract to convey land, upon the ground of fraud, the fraud must be productive of damage, either to the vendor or to third persons. If the misrepresentation was intentional, and made for the purpose of deceiving the vendor, and the vendor relies upon it, and was deceived by it, and would not have entered into the contract but for the fact that he was so deceived, then we think a court of equity will not enforce the contract, whether it be accompanied by damage or not. So far as this kind of suit is concerned, such a misrepresentation is material, although not accompanied by damage.

The counsel for the appellant cite in this connection the case of *Morrison v. Lods*, 39 Cal. 385, as affirming the contrary doctrine. The report of that case is somewhat obscure. It does not show what the representation was, nor whether it was intentionally false or a mere innocent misrepresentation. But if the court meant to decide that a court of equity will enforce a contract obtained solely through a false and fraudulent representation, then we think the decision is in violation of established principles. It is perfectly true, as stated in the opinion, that an action at law cannot be maintained for fraud unless accompanied by damage. It is also true, as stated in the opinion, that a court of equity will not set aside a contract obtained through fraud unless it be productive of injury: 1 Story's Eq. Jur., sec. 203. But it is not true that this applies to suits for specific performance. It is well settled that a court of equity may refuse specific performance of a contract which it would not set aside: *Mortlock v. Buller*, 10 Ves. 308; *Cadman*

v. *Horner*, 18 Id. 11; *Seymour v. Delancy*, 6 Johns. Ch. 222; *Jackson v. Ashton*, 11 Pet. 248; *Barksdale v. Payne*, Riley, 178; *Frisby v. Ballance*, 4 Scam. 299; *Clement v. Reid*, 17 Miss. 542, 543; *Taylor v. Merrill*, 55 Ill. 61; Hilliard on Vendors, 445; Fry on Specific Performance, Am. ed., p. *192, sec. 427.

Although the court will refuse to destroy the contract, it will not further in any way the fraudulent design. In such cases, by an application of the maxim that he who comes into equity must come with clean hands, the court is enabled to give greater effect to the principles of morality than can be done in ordinary cases. The leading text-writers are agreed in this view. Chancellor Kent, after stating the general rule that fraud must be accompanied by damage, and that "there are many duties that belong to the class of imperfect obligations, which are binding in conscience, but which human laws do not and cannot undertake directly to enforce," goes on to say: "But where the aid of a court of equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway": 2 Kent's Com. 490. This statement is adopted by Story: 1 Story's Eq. Jur., sec. 206. So Kerr, in his work on fraud and mistake, says: "Where the aid of a court of equity is sought by way of specific performance of a contract, the principles of ethics have a more extensive sway than where a contract is sought to be rescinded. . . . Where a party calls for specific performance, he must, as to every part of the transaction, be free from every imputation of fraud or deceit," and "must show that his conduct has been clear, honorable, and fair": Kerr on Fraud and Mistake, Am. ed., 357, 358. So Hovenden says: "Specific performance of an agreement is never compelled unless the case is clear of the imputation of any deception; the conduct of the party seeking it must be free from all blame": 2 Hovenden on Fraud, p. 4; see also Fry on Specific Performance, Am. ed., *204. This rule is embodied in section 3391 of the Civil Code, which provides that "Specific performance cannot be enforced against a party to a contract. . . . 3. If his assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due," etc.

And it is evident that such must be the rule. To say otherwise is to place suits for specific performance on the same level with actions at law, which is contrary to all the authorities. If, therefore, the case of *Morrison v. Lods*, *supra*, is to be con-

strued as affirming any such doctrine, it does not state the law correctly. The case of *Board of Commissioners v. Younger*, 29 Cal. 172, was a suit to set aside a contract, and not for specific performance.

In the present case the false and fraudulent representation of plaintiff was the inducing cause of the contract. This is apparent from the fact that as soon as the company discovered the fraud which had been practiced upon it, it repudiated the contract. And it is expressly found that "the land agent, but for such deception, would not have awarded said south half of northeast quarter to said Kelly, but would have awarded it to said Cole."

This state of facts well illustrates the wisdom of the doctrine which does not insist upon measuring everything by the standard of damage, but so far as can be done, allows parties to determine what is for their own interests, and to contract or refuse to contract accordingly. It is evident from the circulars contained in the record that it was the policy of the company to encourage the settlement of its vast tracts of unoccupied land. To carry out this policy, it offered special inducements to settlers. It ought to be allowed to fulfill its promises to those who have relied upon its good faith. It is not for one who falsely pretends to be entitled to the benefit of those promises to say that it is all the same to the company because he pays the same price as the other would. The case is one where the vendor has special motives for selling to one person at a price which it would not accept from another: See *dictum* of Lord Eldon in *Bonnett v. Sadler*, 14 Ves. 528.

It may be conceded in favor of appellant that the company did not take the proper course to rescind its contract with the plaintiff. Be that as it may, he cannot, for the reasons stated, have the aid of a court of equity to carry it out. His case against the company, therefore, fails. And this being so, he cannot inquire into the correctness of the decree directing the company to convey to the intervenor. For if he is not entitled to the specific thing, it is of no consequence to him what becomes of it, and he cannot concern himself with that question. We do not regard the case of *Taylor v. C. P. R. R. Co.*, 67 Cal. 615, as conflicting in any degree with the above positions.

We therefore advise that, upon the appeal of the plaintiff, the judgment be affirmed.

The COURT. For the reasons given in the foregoing opinion, in the appeal of the plaintiff, the judgment is affirmed.

COURTS WILL REFUSE TO SPECIFICALLY ENFORCE CONTRACT which is fraudulent, or is illegal, hard, or unconscionable: *Swint v. Carr*, 2 Am. St. Rep. 44, and note; *Veth v. Gierth*, 92 Mo. 97.

NATIONAL BANK OF D. O. MILLS & Co. v. HEROLD.

[74 CALIFORNIA, 603.]

WARRANT ON STATE TREASURY PAYABLE TO A B, OR ORDER, is transferable so far as to authorize the holder to demand payment, and to maintain in his own name an action thereon.

ASSIGNMENT AND DELIVERY OF WARRANT ON STATE TREASURY is, in equity, an assignment of the debt and an authority to the assignee to receive the money.

STATE TREASURER MUST PAY WARRANT REGULARLY DRAWN ON HIM, without stopping to inquire whether the persons on account of whose claims the warrant was drawn have been paid or not.

PRESUMPTION THAT OFFICER HAS DONE HIS DUTY applies in favor of a warrant issued on the state treasury, and if the warrant was improperly issued, that fact must be shown in order to overcome such presumption.

Attorney-general George A. Johnson, for the appellant.

Beatty, Denson, and Oatman, for the respondent.

PATERSON, J. This is a special proceeding to compel the defendant, the state treasurer, by mandate to pay a certain warrant issued by the state controller. The warrant was first presented for payment to Hon. D. J. Oullahan, who was at that time the treasurer, and upon his refusal to cash the same this proceeding was commenced. Judgment went for petitioner in the court below, Oullahan appealed, and his successor, Herold, has been substituted as defendant herein.

The following is a copy of the warrant:—

“CONTROLLER’S WARRANT.

“\$1,213.

SACRAMENTO, CAL., April 10, 1885.

“The treasurer of state will pay out of the general fund, to the order of J. W. McCarthy, \$1,213.

“Kind of service, sundries.

“Liability accrued March 3, 1885.

(Seal)

“JOHN P. DUNN, Controller.

“No. 8,706.

“No. 2,001.

"Indorsed:—

"Payable out of the appropriation for expenses of the supreme court, under section 47, Code of Civil Procedure, thirty-sixth fiscal year.

"Indorsed:—

"Pay to I. W. Hellman, or order.

"J. W. MCCARTHY.

"ISAIAH W. HELLMAN."

Appellant claims that he was justified in his refusal to pay the warrant: 1. Because it was not issued to McCarthy, clerk of the supreme court, but to J. W. McCarthy, individually; 2. Because such warrants are not negotiable, and they cannot be assigned, at least not without an assignment of the indebtedness; 3. It is not shown that the parties with whom the clerk contracted, and to whom the several amounts of the account were due, have been paid.

1. It is expressly stated in the answer that "said warrant No. 8,706 was drawn in favor of and delivered to J. W. McCarthy, clerk of the supreme court." The omission of the controller, therefore, to describe the official character of McCarthy in the warrant is not material. The warrant shows that it was issued under section 47, Code of Civil Procedure, which authorizes the issuance of warrants to no one except the clerk. It was a matter of record that the account upon which the warrant was issued had been duly certified to be correct, and that thereafter the amount claimed had been audited, allowed, and approved by the board of examiners. The treasurer knew, as matter of fact, that the McCarthy named in the warrant was the clerk of the supreme court, knew his signature, and unquestionably would have paid the warrant if presented by McCarthy himself.

2. Appellant cites a large number of authorities in support of his proposition that warrants like the one above set forth are not negotiable, and that a purchaser gains no greater rights than the payee of the warrant had. This may be admitted, but what boots it? In the leading case cited by appellant, Mr. Justice Field says: "The warrants being negotiable in form are transferable by delivery, so far as to authorize the holder to demand payment of them, and to maintain in his own name an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that when held by a *bona fide* purchaser, evidence of their invalidity or defenses available against the original payee would be ex-

cluded. The transferee takes them subject to all legal and equitable defenses which existed to them in the hand of such payee": *Wall v. County of Monroe*, 103 U. S. 77.

In *Martin v. San Francisco*, 16 Cal. 285, it was held, it is true, that even where there was a regular assignment of such a warrant by the person to whom it was issued, the assignee could not maintain an action upon it without an assignment of the original indebtedness; but it has since been said that an indorsement and delivery of the warrant would be in equity the assignment of the debt, and an authority to the assignee to receive the money: *Dana v. San Francisco*, 19 Id. 491; *People v. Gray*, 23 Id. 127.

The answer of defendant alleges two grounds of defense: 1. That the warrant was issued without authority of law; 2. That it could not be transferred by indorsement. In what respect it is claimed to be without authority of law, we have not been informed. In his brief appellant makes the following fair statement of the case, which we think is a complete answer to his first ground of defense.

"It appears from the petition that said warrant was issued to the said J. W. McCarthy under the authority of section 47, Code of Civil Procedure. Consequently the amount called for was to have been disbursed by him as provided for in said section. It also appears that up to the time of drawing the warrant the provisions of said section had been complied with, and that the bill was approved for the full amount by the board of examiners. At the time the warrant was issued, and at the time it was presented for payment, there was an appropriation, as provided in section 47, Code of Civil Procedure, and said appropriation was unexhausted.

"After the issuance of the warrant, said McCarthy sold the warrant to I. W. Hellman for a valuable consideration, and indorsed on the back of the warrant the following: 'Pay to I. W. Hellman or order. J. W. McCarthy.'

"Said Hellman afterwards sold the warrant to the plaintiff, and indorsed the same in blank, as follows: 'Isaiah W. Hellman.' The court finds that both said Hellman and the plaintiff purchased said warrant in good faith and for value."

3. It does not concern the treasurer whether the parties to whom the several amounts allowed in the clerk's account have been actually paid. If the clerk had presented the warrant in person to the treasurer for payment, the latter would not have troubled himself with such inquiry, and we see no reason for

such an inquiry now. None of the creditors of the clerk under this warrant complain, and the treasurer can scarcely be expected to constitute himself their guardian.

If it be conceded that the fact of non-payment by the clerk, if shown, would be a defense to this proceeding, it is sufficient to say that in this case *prima facie* the warrant is good, the presumption being that the officer has done his duty; and if there are any creditors remaining unpaid, it devolved upon the defendant herein to prove the fact. No attempt was made to plead or prove it.

Judgment affirmed.

PRESUMPTION IS, THAT PUBLIC OFFICERS have properly performed official duties: *Dubuc v. Voss*, 92 Am. Dec. 526.

RICE v. WHITMORE.

[74 CALIFORNIA, 619.]

VALID LEASE MAY BE MADE OF LAND THEN IN POSSESSION OF LESSOR'S TENANT, under an unexpired lease; and the lessor is answerable in damages to his lessee if he fails to dispossess such tenant after the expiration of the first lease, and to deliver possession pursuant to the terms of the first lease.

MEASURE OF DAMAGES RECOVERABLE BY A LESSEE AGAINST HIS LESSOR FOR NOT PUTTING HIM INTO POSSESSION is the value of what the lessee might have made by the use of the leased property during the term of the lease.

ACTION to recover damages for not putting plaintiff in possession of a farm, pursuant to a contract of leasing. One of the instructions given for plaintiff was to the effect that if he was entitled to recover at all "he could recover all he could have made on the ranch during the year; that is, he is entitled to the value of the crop that might have been raised on the ranch during that year by an average farmer, less the cost of raising, cutting, harvesting, etc., the same, and the amount raised, its cost of raising, etc., its value, you must ascertain from the evidence in the case. In determining the amount of damages to be awarded plaintiff, if you find in his favor, the jury should take into consideration all the facts and circumstances proven in the case; and if you find that plaintiff had the stock and utensils, etc., to work and cultivate the ranch, or any portion of it, without hiring it done, that fact you have a right to take into consideration; and taking all the

facts into consideration, the plaintiff is entitled to recover an amount equal to what he would have made had the contract been carried out." The jury found a verdict for the plaintiff. Defendant moved for a new trial; and from the judgment against him and the order denying him a new trial, he appealed.

W. L. Dudley, for the appellant.

W. E. Turner, and Freeman, Bates, and Rankin, for the respondent.

BELCHER, C. C. This is an action to recover damages for an alleged breach of contract.

As stated in the complaint, the contract was made by the parties in September, 1883, and was for the lease of a certain ranch in Stanislaus County, containing about 960 acres of land. It is alleged that the defendant agreed to and with the plaintiff that he "would rent, lease, and farm-let to plaintiff" the ranch for the term of one year from September, 1883, and would forthwith put plaintiff into possession thereof, and would accept as rental therefor one fourth of all grain raised on the premises during the ensuing year, to be delivered to defendant by plaintiff at a certain warehouse in Ceres. It is further alleged that plaintiff then and there agreed to accept, lease, rent, and hire said ranch from the defendant, and to occupy and farm the same on the terms and conditions aforesaid; and that the contract then and there became mutual between the parties. It is then stated that plaintiff owned all necessary teams and outfit to cultivate and farm the ranch, and that he at once commenced to make preparations to enter upon the same; but defendant neglected and refused to put him in possession thereof, and on or about the 31st of October, 1883, informed him that he would not carry out the terms of the agreement in any particular; and that he would not lease, let, or rent the ranch, or any part thereof, to him; and that by reason of such neglect and refusal plaintiff sustained damages in the sum of two thousand five hundred dollars.

The answer denies that defendant made any contract to lease the ranch to plaintiff, as stated in the complaint; and alleges that at the time of the supposed agreement one Hanscom was in possession of the land as a tenant of defendant, which fact was well known to the plaintiff, and the only agreement made was to the effect that defendant would lease to

plaintiff, provided he succeeded in obtaining possession of the land from Hanscom. It is further alleged that at a subsequent time both plaintiff and defendant became satisfied that Hanscom could not be dispossessed in time to rent the land for the ensuing year, and thereupon all negotiations for leasing it were abandoned by consent of the parties, and no lease was made or entered into by or between them.

The case was tried by a jury, and the verdict and judgment were in favor of plaintiff. The defendant then moved for a new trial, and his motion being denied, has brought the case here on appeal from the judgment and order.

1. It is now insisted for appellant that the evidence did not justify the verdict, and a new trial should have been granted for that reason. We have carefully read over all the evidence set out in the transcript, and are of the opinion that it did justify the jury in finding that the agreement constituted a present lease, and was not simply an agreement to make a lease when Hanscom should be dispossessed.

2. But if this be so, it is further claimed that the agreement was void, and damages could not be recovered for its breach, because the defendant was out of possession of the premises, and the plaintiff knew that fact, and also knew that Hanscom would not give up possession without a lawsuit.

There is nothing to show that the land was held adversely by Hanscom; on the contrary, he appears to have rented it by the year some ten years before, and to have held it along from year to year under his original lease. But however this may be, the rule invoked is the rule of the common law, under which property in the adverse possession of another could not be transferred. That rule has been changed here. Under our code, property of every kind, except a mere possibility not coupled with an interest, may be transferred: Civ. Code, secs. 1044, 1045. "A right of re-entry or of repossession for breach of condition subsequent can be transferred": *Id.*, sec. 1046. "Any person claiming title to real property in the adverse possession of another may transfer it with the same effect as if in actual possession": *Id.*, sec. 1047. Surely it cannot, then, be said here that a land-owner cannot make a valid lease of his land until all former leases have expired, and the tenants have surrendered back to him the possession.

3. The court instructed the jury, at the request of the plaintiff, that if Whitmore, in September, 1883, offered to rent the ranch to Rice upon certain terms, and Rice accepted such

terms, and Whitmore agreed to put Rice in possession of the ranch on or before the 1st of October, 1883, then a valid contract was duly entered into between the parties, the terms of which both parties were bound to perform; and if either party refused or failed to substantially carry out the terms of the contract, such party is, in law, liable to the other in damages for a breach of the contract.

This instruction is said to have been erroneous, for the reason that one of the defenses to the action was, that plaintiff and defendant became satisfied that Hanscom could not be dispossessed in time to put in a crop, and therefore all negotiations for leasing were off and abandoned by consent of the parties, that this defense was a question of fact to be determined by the jury, and was wholly ignored by the instruction.

The answer is, that the court had already charged the jury, as one of the necessary elements of plaintiff's case, that it must be shown that "defendant refused or neglected to carry out the terms of the agreement against the will of plaintiff"; and if defendant desired any further or more explicit instruction in reference to the abandonment of the negotiations for a lease, he should have asked for such an instruction. Not having done so, he cannot now be heard to complain that it was not given.

4. It is also claimed for the appellant that the instructions upon the question of damages were conflicting, and therefore erroneous. We are unable to see any necessary conflict in these instructions. They seem to us to have stated the law to the jury quite fully and fairly, and without any substantial error.

We conclude, therefore, that the judgment and order should be affirmed.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

MEASURE OF DAMAGES RECOVERABLE BY LESSEE WHO IS PREVENTED FROM TAKING POSSESSION: See note to *Taylor v. Bradley*, 100 Am. Dec. 428, 429.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

CHICAGO AND ALTON R. R. Co. v. PILLSBURY.

[123 ILLINOIS, 9.]

INSTRUCTION THAT DUTY OF COMMON CARRIER TO ITS PASSENGERS REQUIRED it "to exercise the utmost care, skill, and vigilance to carry plaintiff safely, and to protect him against any and all danger, from whatever source arising, so far as the same could, by the exercise of such a degree of care and vigilance, have been reasonably seen and prevented," was held to state the law with sufficient accuracy, under the circumstances of the case on trial.

CARRIER OF PASSENGERS IS NOT AN INSURER OF THEIR ABSOLUTE SAFETY.
Its liability is limited by care and diligence.

DEGREE OF CARE WHICH COMMON CARRIER OF PASSENGERS MUST OBSERVE FOR THEIR SAFETY IS A QUESTION OF LAW.

CARRIER OF PASSENGERS MUST EXERCISE THE HIGHEST REASONABLE AND PRACTICABLE SKILL, CARE, AND DILIGENCE in selecting suitable machinery and cars, in keeping its road in a fit and proper condition, both as to manner of construction and materials used, in using all appliances adopted for the government of moving trains, and in employing and retaining competent and faithful servants.

CARRIER OF PASSENGERS IN GUARDING THEM FROM DANGERS NOT INCIDENT TO ORDINARY TRAVEL is not required to exhibit as high a degree of care and skill as in protecting them from other dangers. The carrier must, however, omit no care to discover and prevent danger to its passengers that is reasonable and practicable.

DEGREE OF CARE WHICH CARRIER OF PASSENGERS MUST EMPLOY IN DISCOVERING AND PREVENTING DANGER NOT INCIDENT TO ORDINARY TRAVEL varies with the circumstances of each particular case. In many cases, if he observes such ordinary care and diligence as a prudent man would for his personal safety, this will exonerate him from liability. In other cases, it is the duty of the carrier to exercise the utmost care, skill, and diligence to protect his passengers from danger and injury, so far as the same, by the exercise of such care, skill, and diligence, could have been reasonably and practicably foreseen and anticipated in time to prevent injury.

CARRIERS OF PASSENGERS MUST IN NO CASE EXPOSE THEM TO EXTRA-HAZARDOUS DANGERS which might readily be discovered or anticipated by all reasonable, practicable care and diligence.

CARRIER OF PASSENGERS IS ANSWERABLE FOR INJURIES INFLICTED BY A MOB ON ONE OF HIS PASSENGERS, when such mob consisted of striking workmen enraged against non-union men employed in their stead, and the existence of the mob, and of its fierce, lawless, and vindictive spirit, was well known; and the train was stopped at a place where it was not required by law to stop, and non-union men were there taken into one of the cars, wherein a passenger was subsequently injured during an attack by the strikers on the non-union men so admitted therein.

CARRIER OF PASSENGER IS CHARGEABLE WITH NEGLIGENCE IF HE STOPS HIS TRAIN AND PASSENGERS, IN THE MIDST OF A HOWLING, REVENGEFUL, LAWLESS MOB, to take on persons whom the mob are seeking an opportunity to maltreat.

MANNER OF CONDUCTING ORAL ARGUMENT BEFORE A JURY is so much within the discretion of the trial court that the appellate court will not review its action unless manifest injustice has been done.

ACTION by Pillsbury to recover for injuries suffered by him while a passenger on the defendant's train, from a shot fired by striking workmen during an attack made by them on non-union workmen who had been admitted into the same car with plaintiff. After the strike began, it became dangerous for the employed workmen to go to or from the works of their employers, the Joliet Iron and Steel Company, and various modes of transportation were pursued for a time, and then abandoned. Whatever mode was employed, it was necessary to have the men protected by a large police force, as they entered or emerged from the works; and on some occasions attacks were made on the boat or cars in which they were transported. On June 1, 1882, a number of workmen were sent by defendant's train in the morning to the works; and they were expected to return in the evening by the same means. The facilities for protecting them did not exist at the regular station. The train was stopped at the works. A great crowd of riotous strikers had assembled, and their demeanor was very excited, violent, and threatening. Under the protection of policemen the workmen succeeded in passing from the works and into one of the passenger-cars of the train without receiving any serious injury, though the car was stoned, and the glass in one of its doors broken. About a mile and a half from the works was the Brighton Park railroad crossing, at which point the train was stopped as required by law. A number of the strikers, anticipating this contingency, had secreted themselves near by, unknown to defendant's servants and agents, and taking advantage of the stopping of the train,

they rushed upon the car containing the non-union workmen, and made a vicious assault upon them with guns, pistols, and other deadly missiles. During the assault plaintiff was shot by a ball intended for the non-union men. Verdict and judgment for plaintiff. Defendant appealed.

C. Beckwith, George S. House, and A. S. Trude, for the appellant.

Garnsey and Knox, and C. C. Strawn, for the appellee.

SCOTT, J. Under the facts as they must have been found from the evidence by the trial and appellate courts, it is a question of law what duty defendant owed to plaintiff and other passengers on the train at the time the injury was inflicted upon plaintiff, and whether any liability rested upon defendant. Upon these questions, the trial court instructed the jury, it was the duty of defendant, as a common carrier of passengers, "to exercise the utmost care, skill, and vigilance to carry plaintiff safely, and to protect him against any and all danger, from whatever source arising, so far as the same could, by the exercise of such a degree of care and vigilance, have been reasonably foreseen and prevented." It is said this instruction does not announce the law with entire accuracy,—that it required a higher degree of care to be observed by defendant for the safe carrying of a passenger than the law imposes,—and in that respect was misleading.

It is freely conceded there is a marked distinction between the liability of a common carrier as to freights and passengers. As to freights, the carrier is an insurer, and is obligated to carry and deliver safely, at whatever hazard, and from that obligation it can only be relieved by "the act of God" or the public enemy. But the carrier is not an insurer of the absolute safety of the passenger to be carried. Its liability in that respect is limited by care and diligence. What degree of care the common carrier must observe for the safety of a passenger on its train, to exonerate it from liability for injury, is a question of law. The rule of law is quite well understood, that as to the selection of suitable machinery and cars, the fitness of the road, both as to manner of construction and materials used, and in the use of all appliances adopted for the government or moving of trains, and as to the selection and retention of competent and faithful servants, the carrier of passengers is obligated to use the highest reasonable and practicable skill,

care, and diligence. This principle of law is not called in question, but the argument is made, that in guarding the passengers from dangers and perils not incident to ordinary railway travel, the carrier is only to be held to the use of ordinary and reasonable care and diligence. The distinction taken is not without support, both in reason and authority. So far as the machinery and cars furnished for the carriage of passengers, the fitness of the road-bed, and the competency and faithfulness of the servants employed, and in the use of the best known mechanical appliances to insure safety are concerned, the passenger must rely solely on the carrier, and can do nothing to insure his personal safety. It is for that reason the carrier, in this respect, is obligated to the highest reasonable and practicable skill and diligence. The safety of passengers requires the strict and rigid observance of this rule against all carriers, by rail or otherwise; but as to dangers and perils not incident to ordinary perils by any mode of travel, the rule of liability imposed upon the carrier of passengers by law is less stringent. The carrier, however, must omit no care to discover and prevent danger to a passenger or passengers that is reasonable and practicable. The public exigency and security demand this much of the carrier at all times and under all circumstances. It is the duty of carriers by rail to preserve order in their carriages, and to protect passengers from all dangers, from whatever source, arising on their trains, whether from the dangerous and violent conduct of other passengers or otherwise. To this end, all conductors in this state, while on duty on their respective trains, are invested by statute with police power. With regard to danger and hazard to travel arising otherwise than on the train, and not incidents of such travel, the degree of care to be observed to discover and prevent all danger to and consequent injuries to passengers must depend in a large measure on the attendant circumstances. No doubt in many cases, if the carrier observes ordinary care and diligence to discover and prevent injury to passengers, such as any prudent person would do for his own personal safety, it will be exonerated from liability. In other cases and under other circumstances, it will, no doubt, be the duty of the carrier to exercise the utmost care, skill, and diligence to protect the passengers from danger and injury, so far as the same, by the exercise of such care and skill and diligence, could have been reasonably and practicably foreseen and anticipated in time to prevent injury. In no case must the carrier expose

the passenger to extrahazardous dangers that might readily be discovered or anticipated by all reasonable, practicable care and diligence. It is upon this latter principle, if at all, that defendant can be held liable for the personal injuries received by plaintiff. So far as any question of fact is involved, it will be presumed it was found against defendant by the trial court.

There is some evidence that would warrant the jury in finding defendant's servants were fully advised it was a dangerous service to take off and put on the non-union workmen at the dock-gate. It must have been found they knew a desperate and wicked mob, consisting of great numbers, was organized there to prevent, at all hazard, whatever the consequences might be, the taking on of these men, and that it could only be done by the aid of a powerful and efficient police force. Prior to the time the plaintiff was injured, the box-cars containing these laborers had been assailed, and it might reasonably have been inferred the danger to passenger-cars on the same account was imminent, and common prudence should have induced the taking of extraordinary precautionary measures. It could have been readily ascertained, upon the slightest inquiry, the fury of the mob had in no degree abated. Reasonably, it might have been inferred it would be dangerous to continue to take and put off the laborers in the midst of that lawless assembly of rioters. Even ordinary care would have discerned the danger. Under the circumstances, the law would charge defendant with negligence in stopping a train filled with passengers, in the midst of a howling, revengeful, lawless mob, to take on persons whom the mob were seeking an opportunity to maltreat. The defendant was under no legal obligation to stop its train at the point in question, as it was not a station designated for that purpose. To do so was a needless and unwarrantable exposure of the lives and persons of passengers to imminent peril. This train, filled as it was with men, women, and children, as it may be presumed it was, stopped at a point not a station, in the midst of a fierce mob, and the objects of its vengeance taken into the same car with passengers. This was unwise and hazardous in the extreme, to say the least of it. At all events, the offensive persons should have been placed in a car to themselves, where they could have been protected or could have protected themselves, without danger to regular passengers who had not previously been advised as to the danger to be encountered. Some of the passengers, it seems, were advised by the conduc-

tor it would be dangerous to remain in the smoking-car, where the laborers were to be received; but plaintiff was not so advised.

It is said none of the officers had any knowledge the rioters intended to or had any purpose to attack defendant's passenger train at Brighton Park or elsewhere, or at that or at any other time. That is no doubt true. Had the officers of the road been informed the rioters purposed an attack on the passenger train of defendant, at Brighton Park or elsewhere, it would have been criminal negligence to have exposed the passengers to such peril without a sufficient police protection, and which would have been inexcusable for any reason or upon any ground. No such negligence can be imputed to defendant under the facts of this case. But defendant ought reasonably to have anticipated the mob might attack its train to reach the object of their vengeance, so soon as it had passed from the protection of the police, and precautionary measures should have been taken. Such a thing was likely to occur at any near distance from the central point of the disturbance. A like attack had been made prior to that time, two miles distant, upon the laborers that had been carried in the box-car. On this occasion the mob seems to have been more violent than usual, and the utmost care and vigilance should have been taken to prevent the injury to passengers. The verdict is a sufficient warrant for the conclusion reasonable precautions were not observed.

Some criticism is made on the instruction given, in the use of the word "such," and in the use of the words "care, skill, and diligence," but the distinction taken in this respect is too subtle to be warranted by any fair reading of the instruction. After a most careful consideration, it is thought the first instruction given for the plaintiff, of which complaint is made, states the law applicable to the facts of this case with sufficient accuracy, and there is no just ground for complaint on that score. It might be that in another case, where the facts are materially different, the instruction would not be applicable, and might be held to impose a degree of care and skill not enjoined by the law.

What is said of the first instruction is sufficient to dispose of the objections to the other instructions, and they need not be further discussed. It may be conceded the fifth instruction of the series given for plaintiff is in some respects slightly inaccurate, but not seriously so. The injury suffered by plain-

tiff is so serious in its consequences the judgment in his favor ought not to be reversed for any mere subtile objection to an instruction not warranted by the substantial justice of the case.

Objections are also taken to the refusal of the court to give a number of instructions asked by defendant, and to the modification of others by the court. It is seen the instructions for defendant are quite numerous, and state the law very favorably to the defense sought to be made. It may be conceded, as is done, that some of the instructions refused might have been with propriety given, had not others been given containing substantially the same proposition. The court was under no duty to repeat the same thing, although expressed in different language and differently formulated. It would have aided in no proper way the defense defendant was endeavoring to make.

It is assigned for error the court permitted counsel, in his closing argument, to make statements of facts not in evidence, to the prejudice of defendant, and to address the jurors by name, and to propound questions to them, and receive answers to such questions, against the objection of defendant. It may be counsel indulged in intemperate language not justified by anything in the case; but the manner of conducting the oral argument before the jury is so much within the discretion of the trial court that this court will hesitate to interfere, unless it should appear manifest injustice was done. It is the duty of the trial court to require counsel to keep always within the bounds of propriety, and to be mindful of the rights of others who are not permitted in that presence to make reply.

The judgment of the appellate court will be affirmed.

MAGRUDER, J., delivered a dissenting opinion, in which Mr. Chief Justice Sheldon concurred. This opinion was, in the first instance, approved by a majority of the court; but on rehearing was supplanted by the opinion of Mr. Justice Scott. The dissenting opinion denied that the taking on defendant's cars of the non-union workmen was an act of negligence, and insisted that it was a duty which the defendant was bound, or at least entitled, to discharge. There existed no right to exclude these men from the cars. They did not belong to any class which the carrier was entitled to exclude. They had committed no wrong whatever; and the fact that, while guilty of no unlawful or dishonorable act, they had incurred the hatred and were likely to suffer from the violence of lawless and wicked men, did not require the defendant to refuse to receive them on its train, and thereby abandon them to the fury of the mob. With respect to the point that the non-union men were taken on the train at a point which was not a regular station, it was answered by saying that the defendant had the right to stop there,

whether obliged to do so or not; that by a special contract between the Joliet Iron and Steel Company and the defendant, made some weeks prior to June 1, 1882, the latter had agreed to stop at the works for the men, and had, therefore, become obligated to do so; and, finally, that the defendant was not required to carry force adequate to protect its passengers from mobs; citing *Pittsburgh etc. R. R. v. Hinds*, 91 Am. Dec. 224; *Simmons v. New Bedford etc. Steamboat Co.*, 93 Id. 99.

COMMON CARRIERS ARE NOT INSURERS OF THE SAFETY OF PASSENGERS, but are, nevertheless, bound to use the highest degree of care consistent with the mode of transportation: *Sawyer v. Hannibal etc. R. R. Co.*, 90 Am. Dec. 382; *Simmons v. New Bedford etc. Steamboat Co.*, 93 Id. 99; *Morrissey v. Wiggins F. Co.*, 97 Id. 402, and notes; and to that end are bound to use the highest reasonable degree of care in the selection and maintenance of cars and materials, and in maintaining a safe roadway: *Curtis v. Rochester etc. R. R. Co.*, 75 Id. 258, and note thereto; and see the extended note to *Hegeman v. Western R. R. Corp.*, 64 Id. 521-528.

COMMON CARRIER WAS HELD NOT LIABLE FOR INJURY CAUSED BY MOB rushing upon cars and attacking passengers, in *Pittsburgh etc. R. R. Co. v. Hinds*, 91 Am. Dec. 224; but it is said by the court that if the persons managing the train could have prevented the injury (as they might have done in the principal case), the carrier would be liable.

ACTION OF TRIAL COURT IN GIVING CONCLUSION OF ARGUMENT to one side or the other is not reviewable on appeal: *Blume v. Hartman*, 2 Am. St. Rep. 525.

HENDERSON v. CONNELLY.

[123 ILLINOIS, 98.]

MECHANIC'S LIEN IS ORDINARILY LIMITED TO THE INTEREST of the person for whom, or at whose instance, the materials were furnished or the labor performed.

MECHANIC'S LIEN PREVAILS OVER THAT OF A VENDOR, AND ATTACHES TO HIS TITLE where he has not conveyed the property, if the contract of sale provided that the vendee should go on and build upon the premises. The only reasonable construction of this provision is that the purchaser was thereby authorized by the vendors to contract for the erection of a building on lands to which they held the legal title.

James R. Mann, for the appellants.

James Leddy, for the appellee.

CRAIG, J. This was a petition for a mechanic's lien, brought by John A. Connelly against John G. Sharp, Charles M. Henderson, and Wilber S. Henderson. On the hearing, the superior court found that there was due the petitioner \$507, for which sum he was entitled to a lien on the premises as against all of the defendants, and a decree was rendered requiring the defendants, John G. Sharp, Charles M. Hender-

son, and Wilber S. Henderson, to pay petitioner said sum within ninety days, and in case the defendants should make default in the payment of the money, the master in chancery was directed to sell the premises, and all the interest therein, of John G. Sharp, Charles M. and Wilber S. Henderson. The decree also directed the master to pay, from the proceeds of the sale, first, the costs of the proceeding; second, the debt of petitioner, and pay over the surplus to C. M. and W. S. Henderson. The two Hendersons excepted to the decree, and for the purpose of reversing it appealed to the appellate court, where the decree was affirmed.

It is first claimed "that no case was made by the pleadings to justify the decree." While the averments of the petition in regard to the interest of the Hendersons in the premises involved are not as full as may usually be found in a petition of this character, where third persons claiming an interest are made parties to the petition, yet there is enough in the petition to disclose the rights of the parties, and to admit all evidence that has any bearing on those rights, and under the petition and answer we perceive no reason why the rights of all the parties may not be fully settled. The case of *Gage v. Reid*, 104 Ill. 509, has no application here.

The main question, however, presented by the record is, whether the decree was authorized by the evidence. There is no controversy in regard to the facts. In the main they are undisputed. In the fall of 1884 the premises described in the petition were owned by Charles M. and W. S. Henderson. On October 17th of that year they sold the same to John G. Sharp for the sum of \$2,150, payable, \$75 cash down, and the further sum of \$30 on the first day of each and every month, commencing with the first day of February, 1885,—the whole remaining sum to become due on the first day of February, 1888. A contract containing the terms of the sale was drawn up and executed by the parties. It provided, in case of the failure of the party of the second part to make either of the payments when due, the party of the first part had the right to forfeit the contract, provided that Sharp should have four months in which to make good any delinquency in payment before any forfeiture or re-entry should be made. The contract contained this provision: "And said Hendersons agree that when said Sharp shall have expended \$325 in the erection of a suitable dwelling-house upon said premises, they will advance him, as the progress of the building justifies, in

their opinion, the further sum of \$875, to aid in the completion thereof."

About the 1st of December, 1884, Sharp entered into a contract with Connelly, the petitioner, to do the excavating, stone and brick work, and plastering, for a frame house he proposed to erect on the premises purchased of the Hendersons. Connelly furnished the material and performed the labor as agreed, and this petition was filed to enforce a lien for a balance of \$465.58 due under the contract. During the progress of the work on the house, the Hendersons advanced Sharp \$700, to be used in the erection of the building,—\$350 April 16, 1885, and \$350 May 15th. About the first of June all work on the house came to an end, and in July or August following, Sharp having made no payments except seventy-five dollars on the execution of the agreement, the Hendersons took possession of the property, and late in the fall of that year they went on and completed the house at an expense of two thousand three hundred dollars.

It is claimed in the argument that the Hendersons forfeited the contract with Sharp, and that the lien of petitioner was defeated by that forfeiture. By the terms of the contract under which Sharp purchased, the Hendersons, on the first day of June, 1885, had the right to terminate the contract so far as the rights of Sharp were concerned; but before the right of forfeiture had accrued, the lien of the petitioner had attached to the premises. The statute conferred a lien on whatever title or interest Sharp had in the property, and we think it a plain proposition that the lien of petitioner could not be divested without notice to him, and there is no pretense that any steps were ever taken by the Hendersons to terminate the rights of the petitioner in the premises, by notice of forfeiture or otherwise.

The decree, as before observed, directs the master, from the proceeds of sale, after the payment of costs, to pay first the amount due the petitioner, and the surplus to the defendants C. M. and W. S. Henderson. This is claimed to be erroneous, and it is urged, if it was proper to sell the entire title to the property, then the Hendersons were entitled to priority, at all events, for the contract price of the property; and in support of this position we are referred to *Hickox v. Greenwood*, 94 Ill. 266. In the case cited, it was held that where the owner of land gives a contract for a deed to the purchaser, who procures a building to be erected on the premises, the lien of the me-

Mechanic attaches only upon the purchaser's interest, and the vendor cannot be required to part with his title until he first receives full payment of the purchase-money. We are entirely satisfied with the law as laid down in the *Hickox* case, but the rule there announced has no application to the facts of this case. In the case cited, the vendor sold a vacant lot, and gave an ordinary bond for a deed upon the payment of the purchase-money at the expiration of ten years, with semi-annual interest at the rate of ten per cent per annum. The contract of sale did not authorize or in any manner empower the purchaser to erect a building on the premises, or to incur any liability for the improvement thereof. Indeed, the vendor was in no manner connected with the building the purchaser erected on the premises. He merely sold the lot, leaving it with the purchaser to improve it or not, as he might desire. Under such circumstances, of course the lien of the mechanic would only attach to such title as the purchaser held, and the vendor could not be required to part with his title until the purchase-money was paid.

But the case made by this record is entirely different, and must be controlled by other principles. Here it was understood in the contract of sale between the vendors and purchaser, that the latter should go on and build upon the premises, and for the purpose of a consummation of this understanding, a clause was inserted in the contract of sale, by which the vendors agreed to advance the purchaser \$875, to assist him in the erection of a building on the premises, as the building progressed. The only reasonable and fair construction to be placed on this clause of the contract is, that the purchaser was authorized and empowered by the vendors to enter into contracts with builders to furnish material and erect a building on the premises to which they held the legal title. If, therefore, the Hendersons authorized and empowered Sharp, the purchaser, to cause a building to be erected on property where the legal title was in them, upon what ground can they now, after the labor has been expended and materials furnished, claim that the mechanic who furnished the labor and materials which they, by contract, authorized, shall look alone to the title held by the purchaser? Certainly no principle of equity or fair dealing would sanction a precedent of that character. Had the contract of sale contained no provision looking in the direction of any improvement on the property, and had Sharp, the purchaser, gone on, upon his

own responsibility, and incurred a liability with a builder, then we would have no hesitation in holding that the lien of the mechanic must be confined to the interest of the purchaser in the premises, as was done in the Hickox case; but such was not the case here. The vendors, by their contract, have subjected their title to the property to the lien of the petitioner, and the decree, properly, in our opinion, authorized a sale of the legal title, and a priority of payment to petitioner.

The judgment of the appellate court will be affirmed

MECHANIC'S LIEN ATTACHES ONLY TO THE INTEREST OF THE PERSON for whom the work was done or materials furnished: See the extended note to *Loonie v. Hogan*, 61 Am. Dec. 683; and also *McCarty v. Carter*, 95 Id. 572, and *Tritch v. Norton*, 10 Col. 337.

VENDOR IS NOT BOUND BY BUILDERS' LIENS AGAINST THE VENDEE, in the absence of such stipulations as were made in the principal case: See note to *Loonie v. Hogan*, 61 Am. Dec. 689.

POYER v. VILLAGE OF DES PLAINES.

[123 ILLINOIS, 111.]

COURTS OF EQUITY WILL NOT INTERFERE TO RESTRAIN CRIMINAL OR QUASI CRIMINAL PROCEEDINGS, as a general rule, nor take jurisdiction of any case or matter not strictly of a civil nature.

EQUITY WILL NOT RESTRAIN ENFORCEMENT IN APPROPRIATE COURTS OF ORDINANCES ENACTED BY PROPER AUTHORITY, on the ground that such ordinances are illegal, or that the person accused of their violation is innocent. Nor will it enjoin proceedings under an ordinance for the purpose of determining its validity in a court of law, when the defendant has an adequate remedy at law.

EQUITY WILL NOT ENJOIN PROSECUTIONS UNDER A CITY ORDINANCE, TO PREVENT A MULTIPLICITY OF SUITS, unless complainant has first established the invalidity of the ordinance, and his consequent right to protection therefrom by a successful defense in some action at law.

ORDINANCE VOID IN PART.—If there are several prohibitions in an ordinance, some of which are void and others valid, if a penalty is provided applying to each offense separately, the ordinance may be enforced in respect to offenses of which it is valid, as if the void portions had been omitted.

JURISDICTION TO AWARD DAMAGES ON THE DISSOLUTION OF AN INJUNCTION IS NOT LOST by the expiration of the term at which final judgment was entered directing such dissolution, if the defendants were then granted leave to file suggestion of damages, and the cause was thereafter regularly continued from term to term, until suggestions were filed under the leave granted, and the cause was thereafter further continued from term to term, until the suggestions were heard and considered and the damages assessed.

BILL to restrain the prosecution of seven suits already pending, and of other threatened suits, for the enforcement of the following ordinance:—

“Be it ordained by the president and board of trustees of the village of Des Plaines:—

“Sec. 1. That all public picnics and open-air dances within the limits of said village are hereby declared to be nuisances.

“Sec. 2. That for any person or persons to rent, use, or allow to be used, any yard, ground, grove, or other real estate within the corporate limits of the village of Des Plaines, for public picnic purposes, or to permit or in any way allow the use of such property for any purpose by which disorderly persons are gathered in or about said village of Des Plaines, shall constitute and is hereby declared to be a nuisance. Any person creating or permitting any nuisance mentioned and declared in this ordinance to exist, having the right or power to abate the same, shall be subject to a fine of not less than fifty dollars and not exceeding one hundred dollars in every case; and each renting, using, or allowing to be used of any such premises for the purposes aforesaid, or any of them, shall be deemed the creating of a nuisance, and the author thereof be subject to a like fine.”

John Gibbs, for the appellant.

Stiles and Lewis, and C. S. Cutting, for the appellee.

SHOPE, J. The purpose of the bill filed in this case was to restrain the village of Des Plaines, its officers and others, from prosecuting seven suits pending against the complainant for violations of an ordinance of said village, and from instituting other prosecutions for other alleged offenses under such ordinance. The preamble to the ordinance in question recites that by reason of the holding of public picnics, etc., within the village, the disorderly and vicious classes had gathered and congregated in the village, from Chicago and other places to which the village is adjacent, and that the peace of the community had been disturbed thereby, and the persons and the property of the residents therein rendered unsafe; that the police of the village was powerless to protect persons and property within the village against such disorderly persons so gathered at picnics and like assemblages. The bill alleges, in substance, that complainant has grounds within the village

which he has fitted for picnics and other out-door amusements, and that the assemblages upon his grounds have been orderly and well conducted. It then avers the invalidity of the ordinance, and that the prosecutions, seven in number, have been maliciously brought to ruin his business and reputation, and that he will suffer irreparable injury therefrom unless the same are enjoined; that upon trial of one of the cases he was found guilty, and a fine of fifty dollars assessed against him, from which he has prosecuted an appeal to the criminal court of Cook County, where the same was then pending; that the other causes are pending in justices' courts for trial; and that the defendants threatened to institute other prosecutions, etc.; and prays for an injunction restraining such prosecution, and if that cannot be done, that all but one of the pending suits be enjoined until the validity of the ordinance shall be determined in a court of law. A demurrer was sustained, and the bill dismissed.

It is not questioned but that the general subject-matter of this municipal legislation was within the scope of the power conferred upon the village by the act under which it is incorporated; nor that the ordinance was duly passed and published, in conformity with said act, prior to the institution of the suits sought to be enjoined. Ordinances like those under consideration are intended to protect and preserve the peace and good order of society within the municipality; and proceedings under them, although civil in form, to recover a penalty, are *quasi* criminal in character. Courts of equity will not, as a general rule, interfere to restrain criminal or *quasi* criminal prosecutions, or take jurisdiction of any case or matter not strictly of a civil nature: Story's Eq. Jur., sec. 893; 2 Daniell's Ch. Pr. 1620; *Montgomery etc. R. R. Co. v. Walton*, 14 Ala. 209.

The questions arising in the prosecutions sought to be enjoined can be determined in the tribunal in which they are pending, or in that to which they may be taken by appeal. The legality or illegality of the ordinance is purely a question of law, which the common-law court is competent to decide. If the defendant is not guilty of violating this provision, as alleged, the determination of that fact is peculiarly within the province of that court. In either event, appellant had a full and complete defense at law.

When ordinances have been enacted by the proper authority, a court of equity will not interfere, by injunction, to re-

strain their enforcement in the appropriate courts, upon the ground that such ordinances are alleged to be illegal, or because of the alleged innocence of the party charged. Nor will that court enjoin such proceedings under the ordinance for the purpose of determining the validity of the ordinance in a court of law, when, as in this case, the defendant has an adequate remedy at law: *West v. Mayor*, 10 Paige, 539; *Davis v. American Society*, 6 Daly, 81; *Cohen v. Commissioners of Goldboro*, 77 N. C. 2; *Devron v. First Municipality*, 4 La. Ann. 11; *Yates v. Village of Batavia*, 79 Ill. 500; *Moses v. Mayor*, 52 Ala. 198; *Burnett v. Craig*, 30 Id. 135; *Hamilton v. Stewart*, 59 Ill. 330; *Davis v. American Society*, 75 N. Y. 362.

In *West v. Mayor*, *supra*, Chancellor Walworth, in delivering the opinion of the court, says: "The question as to the validity of the corporation ordinance does not properly belong to this court for decision, where the complainants, as in this case, have a perfect defense at law if the ordinances are invalid, or if they do not render the complainants, or those in their employ, liable for the penalty. And it would be a usurpation of jurisdiction by this court if it should draw to itself the settlement of such questions when their decision was not necessary in the discharge of the legitimate duties of the court."

If the ordinances are invalid, they furnish no warrant for prosecutions, or the imposition of fines, or the recovery of penalties under them, and would be no shield, in an action at law, against those responsible for the injuries inflicted upon the complainant by such prosecutions. If the authorities of this village can be enjoined from prosecuting under an ordinance preservative of the peace (as this one certainly is), so they might be restrained from the enforcement of any other ordinance of the village. Their effort to discharge their duty to the public would be rendered unavailing, and the community left at the mercy of the lawless and vicious elements of society until such time as the question could be settled in the courts of equity. If it should at last be determined that the ordinance was valid, that court would be powerless to enforce its provisions or impose the penalties denounced against its violation, but must remit the cases to the courts of law, which, before the assumption of jurisdiction by the courts of equity, had the right to determine every question submitted to and determined in the equity jurisdiction.

There are, however, two exceptions, clearly recognized, to

the rule that courts of equity will not interfere to restrain trespasses, whether committed under the forms of law or otherwise, which are, first, to prevent irreparable injury; and second, to prevent a multiplicity of suits: *Mayor of Brooklyn v. Meserole*, 26 Wend. 132; *Mooers v. Smedley*, 6 Johns. Ch. 28; *Owens v. Crossett*, 105 Ill. 356; *Gartside v. City of East St. Louis*, 43 Id. 47.

In *Owens v. Crossett*, *supra*, and kindred cases, the jurisdiction is maintained upon the express ground that the trespasses were continued, and the trespassers being wholly insolvent, there was no adequate remedy at law, and the injury was therefore irreparable. There is no allegation in the bill in this case showing insolvency of the defendants thereto, or their inability to respond in damages to any amount for which the complainant might recover damages. The bill contains only a general allegation of irreparable injury. Before a court of equity will interfere to prevent a trespass upon this ground, "the facts and circumstances must be alleged, from which it may be seen that irreparable mischief will be the result of the act complained of, and that the law can afford the party no adequate remedy": *Goodell v. Lassen*, 69 Ill. 145; *Livingston v. Livingston*, 6 Johns. Ch. 497; High on Injunctions, 34, and authorities.

It is insisted by counsel that a court of equity should restrain these prosecutions in order to prevent the multiplicity of suits. Bills of peace will lie, under some circumstances, for the purpose of quieting and suppressing litigation. It is said, however, that to entitle a party to maintain a bill on this ground there must be a right claimed affecting many persons, "for if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed": 2 Story's Eq. Jur., sec. 857.

In the case of *West v. Mayor*, *supra*, the chancellor, quoting from what he had said in *Oakley v. Mayor of New York*, which was a bill for injunction to restrain prosecutions under the market ordinances of the city, uses the following language: "If the objection to the legality of these ordinances was well taken, the complainant has a perfect defense at law, and this court would not grant an injunction to protect him against a multiplicity of suits until his right to such protection had been established by a successful defense at law in some of the suits"; and cites in support the case of *Eldridge v. Hill*, 2 Johns. Ch. 281; and concludes: "I am not aware of any case in which

this court has sustained such a bill to prevent the defendant from suing at law where the rights of the party depended upon a question of law merely, and where the defendant in the case at law must eventually succeed without the aid of this court, if the law is in his favor."

Edgerton v. Hill, *supra*, was a bill for injunction to restrain all but one of a series of prosecutions for the erection and maintenance of a nuisance, and to enjoin the bringing of other suits threatened to be brought for its continuance. Kent, C. J., denied the injunction, saying: "No case goes so far as to stop these continued suits between two single individuals so long as the alleged cause of action is continued, and there has been no final or satisfactory trial or decision at law upon the merits." In *McCoy v. Corporation of Chilicothe*, 3 Ohio, 379, 17 Am. Dec. 607, it is held that the repetition of actions for trespasses between the same parties is not that multiplicity of suits which will induce a court of equity to interfere by injunction. In this case the bill alleges the pendency of the suit sought to be enjoined, but does not show that the complainant had established the invalidity of the ordinance at law. On the contrary, it is shown that in the only case tried, the validity of the ordinance was sustained at law. If the ordinance is valid, as held by the court imposing the penalty mentioned, equity will certainly not interfere to protect the complainant from deserved punishment for its violation, nor because the common-law court may have erred in its judgment as to the complainant's guilt or innocence. Nothing could be more detrimental to society, and provocative of violations of law, than for courts of equity to interfere in such cases by injunction, and thereby protect repeated acts in violation of ordinances which might each furnish new ground of complaint. While the injunction continued, the functions of municipal government would be suspended, and irreparable injury might thereby ensue. If the municipal law be of doubtful validity, the complainant cannot, by his willful and repeated violation of its provisions, each furnishing separate grounds for prosecution, and depending upon separate facts, create this ground for equitable interposition without first settling the validity of the ordinance in the courts of law. If he fears the prosecution of other suits, he can refrain from the repetition of his acts in violation of its provisions until the proper forum has determined its invalidity.

The case of *Third Avenue R. R. Co. v. Mayor of New York*,

54 N. Y. 159, cited by counsel, was a bill to enjoin all but one of seventy-seven suits brought against the railroad company for running its trains into the city without a license, as provided by ordinance. The bill attacked the validity of the ordinance, and it was held that a demurrer to the bill was properly overruled, upon the ground that, had the suits been brought in a court of record, they could have been consolidated under a statute authorizing the consolidation of causes as a matter of right; and as the magistrate's court in which they were pending was without such power, and as the prosecutions of all at the same time separately would be onerous and oppressive, the case was one, in the opinion of the court, where equity jurisdiction might properly be invoked and exercised. This case can have no application here, nor does it conflict with the rule announced in *West v. Mayor, supra*, and kindred cases.

The case of *Wood v. City of Brooklyn*, 14 Barb. 425, relied on by counsel, is clearly distinguishable from the case at bar. There the ordinance was clearly void, and provided for arrest, imprisonment, and imposition of a fine for an act the complainant was clearly authorized by the statutes of the state to do; and it further appeared prosecutions had been threatened, but were delayed, and not commenced against him; and the court found that the fact that the ordinance remained apparently in force, so that the threatened prosecutions might be brought under it, and the complainant imprisoned before trial, injured his business, and that therefore, there being no actual trespass, there was no adequate remedy at law for such injury.

In the subsequent case of *Davis v. American Society*, 75 N. Y. 362, in which the complainant sought relief from the enforcement of a penal statute, upon the ground, among others, that they had not in fact violated the law, the court of appeals held that a court of law was a proper forum in which to try that question, and refused the relief, distinguishing that case from *Wood v. City of Brooklyn, supra*.

In this case, the ordinance is not claimed to be wholly illegal. That part of the ordinance which prohibits the renting or permitting the use of any yard, grounds, etc., for any purpose whereby disorderly persons are congregated, has not received judicial construction, but it would seem to fall clearly within the general powers conferred by law upon this corporation. If there are several prohibitions in an ordinance,

some of which are void and others valid, if a penalty is provided applying to each offense separately, the ordinance may be enforced as to offenses in respect of which it is valid, as if the void portions had been omitted: Dillon on Municipal Corporations, 421, and note. The bill is wholly silent as to what portion of the ordinance the prosecutions complained of were brought under; and the presumption would be that they were prosecuted under the valid ordinance. This clearly distinguished this case also from *Wood v. City of Brooklyn*, *supra*, and authorities of like import.

It is urged that the circuit court erred in awarding damages upon the dissolution of the injunction. It appears that the order dissolving the injunction was accompanied by an order duly entered, granting leave to the defendants to file suggestion of damages, and the cause was continued until the next term of court, and thereafter regularly continued, from term to term, until the 3d of January, 1885, when suggestions were filed under the leave granted June 19, 1884. The cause again appears to have been continued from term to term until November 2, 1885, when the suggestion came on for hearing. It was then objected that the court had no jurisdiction to assess damages, because the suggestions were not filed during the term at which the injunction was dissolved, but the court, notwithstanding this objection, heard evidence and assessed the same. In this case, as in *Albright v. Smith*, 68 Ill. 181, the object of the bill was defeated by the dissolution of the injunction, and the order made thereon was a final order. It was competent, however, for the court to grant leave to the defendant to file suggestion of damages, and for any reason satisfactory to the court to extend the time in which to file the same, which, in effect, the court did by the entry of its order and continuing the case. The court, after having granted such leave, did not lose jurisdiction by the subsequent continuances. It is apparent that complainant had notice of the leave upon which the case was kept on the docket, and might, at any time, have insisted upon the disposition thereof. We are of opinion that the court retained jurisdiction for the purposes of assessment of damages.

The evidence clearly sustains the finding of the court in respect of the damages allowed. Finding no error in this record, the judgment of the appellate court will be affirmed.

HARMON v. AUDITOR OF PUBLIC ACCOUNTS.

[123 ILLINOIS, 122.]

DEFENDANTS ARE ESTOPPED BY A DECREE WHICH DETERMINES THEIR RIGHTS AS AGAINST EACH OTHER, to the same extent as if they were respectively complainant and defendant, instead of being joined as defendants.

JUDGMENT AGAINST A COUNTY, in a matter of general interest to all its citizens, is binding on the latter, though they are not parties thereto. Every tax-payer is a real, though not a nominal, party to such judgment.

JUDGMENT IN A SUIT BROUGHT BY TAX-PAYERS OF A TOWN AGAINST THE TOWN AND A RAILROAD COMPANY, TO ENJOIN THE ISSUE BY THE TOWN OF BONDS to the company, by which it is adjudged that such bonds should issue, is binding on all the other tax-payers of the town, though not parties to the suit.

VALUE OF PLEA OF FORMER RECOVERY is not to be determined by the reasons which the court gave for rendering the former judgment or decree.

JUDGMENT IS CONCLUSIVE OF ALL QUESTIONS WITHIN THE ISSUE, WHETHER FORMALLY LITIGATED OR NOT. Principle of *res judicata* extends not only to questions of fact and of law which were decided in the former suit, but also to grounds of recovery or defense which might have been but were not presented.

JUDGMENT ESTABLISHING THE DUTY OF A CITY TO ISSUE BONDS WILL PRECLUDE SUCH CITY AND ITS TAX-PAYERS from subsequently contesting the validity of the bonds on grounds which might have been but were not urged in the former suit; such, for instance, as that the election by which the issue of the bonds was authorized was irregular and void.

JUDICIARY HAVING ONCE DETERMINED THAT A BOND OR CONTRACT IS VALID CANNOT, AS AGAINST AN INNOCENT PURCHASER of such bond or contract relying on such decision, subsequently impair its obligation.

Cook and Lawrence, and W. and W. D. Barge, for the appellants.

M. D. Hathaway, for the appellee.

MAGRUDER, J. This is a bill filed on April 28, 1882, in the circuit court of Ogle County, by John Harmon, Samuel Domer, Daniel Fager, and Reuben S. Marshall, resident property owners and tax-payers in the town of Mount Morris and county of Ogle, against the auditor of the state, the treasurer and clerk of said county, the collector of said town, and the holders of the bonds hereinafter described, charging that fifty bonds of said town of five hundred dollars each, and twenty-five bonds of said town of one thousand dollars each, dated May 3, 1875, payable May 1, 1885, drawing ten per cent interest, payable annually, and all issued and signed by John W. Hitt, the supervisor, and H. H. Clevidence, the town clerk, of said town, are void for want of power in said supervisor and clerk to issue the same, and praying that the same may

be decreed to be null and void, and that the officers of the law may be perpetually enjoined from collecting any taxes to pay the same from the property of complainants and the other tax-payers of the town. Answers were filed denying the allegations of the bill, and setting up the defenses hereinafter mentioned. The circuit court dismissed the bill for want of equity, and its decree has been affirmed by the appellate court, from which the case comes to us by appeal.

The same indebtedness involved in this suit has already been passed upon by this court in *Chicago and Iowa R. R. Co. v. Pinckney*, 74 Ill. 277. In that case, Daniel J. Pinckney, John W. Hitt, Jacob H. Munnua, John E. McCoy, Milton E. Getzendaner, and John Sprecher, then resident property owners and tax-payers of the town of Mount Morris, filed their bill on November 11, 1871, in the circuit court of Ogle County, against the Chicago and Iowa Railroad Company, the town of Mount Morris, Charles Newcomer, the then supervisor, and Henry H. Clevidence, the then town clerk, of said town, "to enjoin the town and its officers from issuing bonds to the Chicago and Iowa Railroad Company in the sum of seventy-five thousand dollars." After answers and replications filed, and hearing had, the circuit court decreed in accordance with the prayer of the bill, and upon appeal, this court, at the September term, 1874, held that the town had power to issue the bonds, and reversed the decree of the circuit court, and dismissed the bill filed therein, as will be seen by reference to the opinion in 74 Ill. 277.

After the opinion of this court in the Pinckney case had been filed, and while the proceedings on rehearing were still pending, negotiations were begun for a settlement of the claim of the railroad company against the town for the seventy-five thousand dollars of bonds. Communications in writing, dated November 14, 1874, signed by property owners and tax-payers in the town, were addressed to the complainants in the Pinckney suit, advising a compromise with the company, and pledging the influence of the subscribers to induce the town to assume the expenses of the litigation. Two of these communications were signed respectively by Reuben S. Marshall and Samuel Domer, two of the appellants herein. At a special town-meeting held on March 19, 1875, resolutions were passed accepting a previous proposition made by the president of the railroad company to the town supervisor to take bonds to the amount of fifty thousand dollars in lieu of the bonds amount-

ing to seventy-five thousand dollars, agreeing that the town would pay all the expenses of the Pinckney suit, amounting to sixteen hundred dollars, and thanking the supervisor for his efforts in making the settlement. At the annual town-meeting held on April 6, 1875, the proceedings of the special town-meeting and the resolutions there adopted were "fully ratified and approved."

By this compromise the town was saved from a possible indebtedness of twenty-five thousand dollars. Its liability to issue bonds to the amount of seventy-five thousand dollars, which the railroad company was entitled to receive by virtue of the decision made in its favor, was discharged by the issuance of bonds amounting only to fifty thousand dollars. The latter bonds, so issued in compromise of the railroad company's claim, are the bonds hereinbefore referred to as being dated May 3, 1875, fifty of five hundred dollars each, and twenty-five of one thousand dollars each, and which this bill is filed to cancel. All of them are now in the hands of innocent holders, who have purchased them in good faith, relying upon the former decision of this court as to their validity. One of the appellees, the German Insurance Company of Freeport, owns twenty-six thousand five hundred dollars of them, purchased for value and before maturity.

The defendants set up the former proceedings in the Pinckney suit as a bar to the relief sought by the present suit.

Both the Chicago and Iowa Railroad Company and the town of Mount Morris were parties to the Pinckney suit. In that suit it was decided that the town had the power to issue the bonds, and that the railroad company was entitled to have them issued in pursuance of the vote taken and by reason of its compliance with the conditions exacted of it. The decision so made was final and binding as between the railroad company and the town, and, as between them, established the validity of the bonds. If the bonds had been issued and suit had been brought on them by the company against the town, it will not be claimed that the latter could have defended on the ground that the election, in pursuance of which the bonds were issued, was invalid.

It makes no difference that the railroad company and the town were both defendants in the Pinckney suit. "In chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-

defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree": *Corcoran v. Chesapeake and Ohio Canal Co.*, 94 U. S. 741; *Louis v. Brown Township*, 109 Id. 162; *Scotland County v. Hill*, 112 Id. 183.

The obligation, which rested upon the town to issue bonds to the amount of seventy-five thousand dollars to the railroad company, was just as binding by reason of the decision in the Pinckney case as though judgment had been rendered in a *mandamus* proceeding or in a suit on the bonds. If this be so, then the complainants, as citizens of the town, cannot by a proceeding to prevent the collection of a tax to pay the bonds dispute their validity upon any of the grounds which were or could have been litigated in the Pinckney suit. The law upon this subject is thus stated in *Freeman on Judgments*, 3d ed., sec. 178: "A judgment against a county, or its legal representatives, is a matter of general interest to all its citizens, is binding upon the latter, though they are not parties to the suit. A judgment for a sum of money rendered against a county imposes an obligation against the citizens which they are compelled to discharge. Every tax-payer is a real, though not a nominal, party to such judgment. If, for the purpose of providing for its payment, the officers of the county levied and endeavored to collect the tax, none of the citizens can, by instituting proceedings to prevent the levy or enforcement of the tax, dispute the validity of the judgment nor relitigate any of the questions which were or which could have been litigated in the original action against the county."

The views of the text-writer are sustained by the following authorities: *Clark v. Wolf*, 29 Iowa, 197; *Tredway v. Sioux C. & P. R'y Co.*, 39 Id. 663; *State ex rel. Wilson v. Rainey*, 74 Mo. 229; *Commissioners v. Hinchman*, 31 Kan. 729.

It is claimed, however, that the Pinckney suit is to be regarded as a controversy between the complainants therein on one side and the defendants therein on the other side, and not merely as a controversy between two of the defendants, the railroad company and the town. In this view, it is urged that the decree in that suit cannot be pleaded as a former adjudication in the present suit, for the reason that the complainants there were not the same persons as the complainants here. The proceeding instituted by Pinckney and others was

a chancery proceeding. The present proceeding is also upon the chancery side of the court. Where the action is at law and a judgment in an action at law is pleaded as a former recovery, the defense has a more restricted character than in a chancery suit.

The Pinckney bill was filed by certain property owners and tax-payers, as representatives of a class. Though not formally stating that it is filed on behalf of all the other tax-payers in the town, yet it constantly refers to them and their interests in the questions involved. It alleges that "your said orators and the other tax-payers of said town" will suffer injury; that the issue of the bonds will be in violation of the rights "of your said orators and the other tax-payers of said town," and an attempt to deprive "your orators and the other tax-payers of said town" of their property, etc., and to take the property of "your said orators and said other tax-payers of said town" for a private use without compensation to "your said orators and said other tax-payers." Its prayer is, that the town be restrained from "collecting any taxes upon the taxable property of said town of Mount Morris to pay said bonds."

Moreover, the Pinckney suit was adopted by the town as its own litigation, when the town paid the expenses of it, and compromised it through the town officers and by resolutions of the town meetings.

The present suit was begun by Harmon and others, also tax-payers and property owners of the town, as representatives of the same class, for whose benefit the Pinckney bill was filed. The complainants in this proceeding were represented by the complainants in the former suit, and are therefore bound by the decree therein entered. The remedy in suits of the character here indicated is in the interest of a class of individuals having common rights that need protection, and in the pursuit of that remedy individuals have the right to represent the class to which they belong. This jurisdiction, in some respects, rests on the principles of a proceeding *in rem*.

We therefore think that there is sufficient identity between the parties filing the present bill and those who filed the bill in the Pinckney case to justify the pleading of the decree entered there as *res judicata* in this case. The views here expressed are sustained by the following authorities: *State v. C. & L. R. R. Co.*, 13 S. C. 290; *Terry v. Town of Waterbury*, 35 Conn. 526; *Sabin v. Sherman*, 28 Kan. 289; *Smith v. Swormstedt*, 16 How. 303.

It is claimed, however, that the cause of action in the present suit is not the same as the cause of action in the Pinckney suit. To support this position reference is made to the case of *Chicago etc. R. R. Co. v. Mallory*, 101 Ill. 583, where it was held that the provision in the charter of the Chicago and Iowa Railroad Company for holding an election to authorize subscriptions and donations by the town requires such election to be held by three judges and two clerks, as in general elections, and that an election at a town-meeting presided over by one moderator and with only one clerk is void, and confers no authority to issue the bonds. The election in the town of Mount Morris, which authorized the issuance of the bonds above specified, was held at a town-meeting presided over by one moderator, and therefore falls within the terms of the decision in the Mallory case. It is too late, however, to apply the doctrine of the Mallory case to the Mount Morris bonds.

The opinion in the Pinckney case only discusses two points: 1. Whether the constitution of 1870 prohibited a donation by a town to a railroad, where the donation was authorized by a vote of the people before the adoption of the constitution; and 2. Whether the vote in favor of the Mount Morris donation was void by reason of defects in the petition for the election and in the notice of the election. As the opinion makes no reference to the point discussed in the Mallory case, as the same is above stated, counsel say that the Pinckney decision is not *res judicata* as to that point. We are, therefore, asked to set aside the bonds held by the appellees in this case, because the election, which authorized their issuance, was held at a town-meeting presided over by one moderator.

The value of a plea of former recovery is not to be determined by the reasons which the court rendering the former decree or judgment may have given for doing so: *Girardin v. Dean*, 49 Tex. 243; *Greathead v. Bromley*, 7 Term Rep. 456; *Barrett v. Failing*, 8 Or. 152; *Freeman on Judgments*, 3d ed., sec. 275; *Davis v. Talcott*, 12 N. Y. 184. Nor is such former judgment or decree conclusive only as to questions actually and formally litigated. It is conclusive as to all questions within the issue, whether formally litigated or not. In *Beloit v. Morgan*, 7 Wall. 619, it is said: "The principle of *res judicata* reaches further. It extends not only to the questions of fact and of law which were decided in the former suit, but

also to the grounds of recovery or defense, which might have been but were not presented."

In *Rogers v. Higgins*, 57 Ill. 244, it was held: "When a complainant in chancery presents his cause of action before the court, he should bring forward and urge all the reasons which then existed for its support. After a determination of the suit, the controversy cannot be reopened to hear any additional reason which before existed, and was within the knowledge of the party in support of the same cause of action. The principle of *res judicata* embraces not only what has actually been determined in the former suit, but also extends to any other matter properly involved, and which might have been raised and determined in it."

To the same effect are *Ruegger v. Indianapolis etc. R. R. Co.*, 103 Ill. 449; *Hamilton v. Quimby*, 46 Id. 90; *Aurora City v. West*, 7 Wall. 82; *McMicken v. Morgan*, 9 La. Ann. 208; *Preble v. Board of Supervisors*, 8 Biss. 358.

We think the point now raised against the bonds was presented by the pleadings and issues in the Pinckney suit, and might have been raised and determined in that suit. The bill there refers to the sections of the railroad charter, which provide for calling the election. It alleges "that the said special town-meeting and election," etc., "are in direct conflict with the provisions of the constitution of the state," etc. It further alleges that the "ballots deposited by the voters of said town at said special town-meeting and election for said donation were illegal and void in this, that the said voters had no legal power to determine by the casting or depositing of their said ballots as aforesaid at said special town-meeting and election whether the said town should . . . make such donation of seventy-five thousand dollars, or to bind, . . . by their votes deposited at said special town-meeting and election, the said town to make such donation, or to issue their said bonds," etc. The prayer is, that the town, etc., "be enjoined from making any donation in bonds, . . . under and in pursuance of said special town-meeting and election," etc., and that "said special town-meeting and election held thereunder may be decreed to be altogether null and void," etc. The answer admits the provisions of the charter, as alleged, and also admits the special town-meeting and election; and avers that "said special town-meeting and election was held, conducted, and return thereof made in all respects as required by law." The decree found the equities for the complainants, and that the

allegations in the bill were true. The order of this court reversed the decree, and dismissed the bill.

It is very evident, from this review, that the validity of the election, authorizing the bonds to be executed, was at issue in the Pinckney suit. Not one question alone, but every question affecting the validity of the election, was there at issue. Under the issues formed by the pleadings, the question whether the election should have been conducted as a general election, with three judges and two clerks, instead of being conducted as a town-meeting election, with one moderator and one clerk, was just as much involved as the question in regard to the sufficiency of the petition and notice, which was discussed by this court in its opinion. The fact that the point afterwards decided in the Mallory case, and now pressed upon our attention here, was not brought to our notice in the Pinckney case, does not destroy the force of the Pinckney decree as a bar to the present proceeding. As was said in *Preble v. Board of Supervisors*, *supra*: "The complainants could not divide their cause of action, setting up one ground of illegality in that suit, and if they failed in that, bring a second suit for a like purpose, setting up another ground of illegality. They should have disclosed the entire wealth of their case at once."

Some other points are made by counsel for appellants, but they are of minor importance, and we do not deem it necessary to discuss them. We have carefully weighed them, and do not consider them to be well taken. If there were no other answer to them, they could not be allowed to disturb the decree of the appellate court in this case, for the reason hereinafter stated.

This record shows beyond question that the defendant bondholders are purchasers for value without notice, and that they bought their bonds relying on the Pinckney decree. This being so, we have no power to now declare the donation void as against these defendants, even though the decision in the Pinckney case was wrong. A state court cannot by a decision, any more than the state legislature can by a statute, impair the obligation of a contract.

By a series of decisions between 1853 and 1859, the supreme court of Iowa upheld the right of the legislature of that state to authorize municipal corporations to subscribe to certain railroads, and to issue bonds accordingly. In a case that came before it after 1859, that court overruled its former decisions upon that subject. In *Gelpeke v. City of Dubuque*, 1

Wall. 175, the supreme court of the United States held that the last decision of the Iowa court could not affect the validity of bonds issued and put upon the market while its earlier decisions were in force, and laid down the doctrine, which has since been firmly adhered to, that if a contract, when made, was valid under the constitution and laws of a state, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or judiciary can impair its obligation: *Havemeyer v. Iowa City*, 3 Wall. 294; *Olcott v. Supervisors*, 16 Id. 678; *Green County v. Conness*, 109 U. S. 104; *Douglass v. County of Pike*, 101 Id. 677; *County of Rolls v. Douglass*, 105 Id. 728; *Stevens v. Pratt*, 101 Ill. 206.

The judgment of the appellate court is affirmed.

PRIOR JUDGMENT IS BAR TO MAINTENANCE OF ANOTHER ACTION which involves the questions already litigated, or which might have been litigated, in the former action: *Bell v. Merrifield*, 4 Am. St. Rep. 436, and note 444.

JUDGMENT IN PROCEEDING TO COMPEL CITY TO ISSUE BONDS, determining it to be the duty of the city to issue them, is a bar to any question which might have been litigated in such proceeding: See note to *De Voss v. Richmond*, 98 Am. Dec. 681 et seq.

LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY v. BROWN.

[123 ILLINOIS, 162.]

NEGLIGENCE. — INVITATION TO A PERSON TO RIDE IN A DANGEROUS PLACE, given by the servants of a railway company, may render his apparent want of care in riding in such place the negligence of the carrier. He had a right to assume that its servants knew what was safe, provided the act which he did on their advice did not involve a reckless exposure of himself, and was not one which no man of ordinary prudence would do.

WHERE ONE IS PUT IN A PLACE OF PERIL BY THE INVITATION OF THE SERVANTS OF A RAILWAY COMPANY, the law requires them to exercise a degree of care corresponding to the danger to which they have exposed him. If they are about to make "a running switch," or do any other act fraught with special peril to him, they must advise him of the impending danger, and give him an opportunity to guard against or escape from it.

THOUGH A RAILWAY CAR IS NOT OPERATED FOR THE PURPOSE OF CARRYING PASSENGERS, yet if a person takes passage therein by the invitation of servants in charge thereof, they thereupon become bound to operate the train in such manner as due care and caution would suggest for his safety.

NOTICE OF PRIVATE RULES AND REGULATIONS OF A RAILWAY COMPANY, prescribing the duties and powers of its employees, must be brought home to the knowledge of persons before they can be affected thereby.

RAILROAD COMPANY IS ANSWERABLE FOR ACTS OF ITS SERVANTS in the course of their employment, whether abusing or rightfully pursuing the powers conferred on them, and whether acting within or in direct violation of their instructions.

SHIPPER ON RAILWAY HAS THE RIGHT TO ASSUME that persons found in charge of the train and of his property are authorized to act for the company, and he is not bound to stop and inquire as to the extent of their authority.

CUSTOM OF ALLOWING SHIPPERS OF LIVE-STOCK TO RIDE UPON ENGINES, and upon cars containing such stock, is admissible in evidence as tending to show that the plaintiff, who was such a shipper, had a right to be so carried, and that the servants of the company who so carried him did so by its authority.

FACT THAT INJURED RAILWAY PASSENGER MIGHT HAVE AVOIDED DANGER BY PURSUING ANOTHER AND DIFFERENT MODE OF TRAVEL will not relieve the company from liability if its servants invited him to ride on its cars in a position of danger, and exposed him to injury by their want of care.

PASSENGER GUILTY OF SLIGHT NEGLIGENCE MAY, NEVERTHELESS, RECOVER for a personal injury resulting from the gross negligence of the carrier.

ACTION on the case by the administratrix of Nelson Brown, to recover damages for the death of her husband, through the negligence of defendant's servants. The decedent was, and for several years had been, a shipper of stock to the Union Stock Yards of Chicago. Defendant's yard was about three quarters of a mile from the stock-yards; and its habit was to attach cars containing stock to a switch-engine, and thereby draw them over the tracks of the Union Stock Yards and Transit Company to the Union Stock Yards. On August 11, 1881, decedent, accompanying certain cars loaded with his stock, reached defendant's yard, where the caboose in which he had been riding was detached from the train, and the switch-engine was attached thereto. The engineer told him to get on this engine. He did so, and was killed while the servants in charge of the train were trying to make a "running switch," and under the circumstances disclosed in the opinion. Judgment for plaintiff.

C. D. Roys and P. B. Smith, for the appellant.

G. M. Stevens and G. A. Dupey, for the appellee.

SHOPE, J. This was an action by appellee, as administratrix of Nelson Brown, deceased, to recover damages for causing the death of said deceased. The trial in the superior court of Cook County resulted in a verdict for plaintiff, and

judgment thereon. Upon appeal to the appellate court for the first district, the judgment of the superior court was affirmed, and the case is brought here by the further appeal of the railroad company.

If the case was properly submitted to the jury, they, by the verdict rendered, necessarily found every fact material to a recovery in favor of the plaintiff. We must accept the general judgment of affirmance as settling all questions of fact favorably to the plaintiff below, and that the evidence is sufficient to sustain the finding of the jury, under the issues, as made by the pleadings in the case. We must assume, therefore, that plaintiff's intestate was rightfully a passenger on defendant's train, in charge of his stock, and had a right to be safely carried to the Union Stock Yards, and was, as between himself and defendant, rightfully, and by invitation and direction of defendant, by its servants in charge of his stock and of defendant's engine, on the foot-board of the engine, as alleged in the declaration, and was, at the time of his injury, in the exercise of due and ordinary care for his safety, and that his injury and death were caused by and resulted from the gross negligence of defendant's servants in the running, management, and operation of the engine upon which he was so, by invitation, rightfully riding, as charged in the declaration. Our consideration will, therefore, be confined to questions of law which arise upon the admission and exclusion of evidence, and upon instructions given, refused, or modified at the trial.

The principal question, and the one of greatest difficulty, is in reference to the alleged negligence of the deceased in getting upon the foot-board of the switch-engine, and attempting, in that position, to ride from Forty-third Street to the stock-yards. Many of the instructions asked by appellant proceed upon the theory that the deceased was guilty of such negligence, in so being upon the foot-board of the engine, as to prevent a recovery by his personal representative. It cannot be said, however, that the deceased, in getting on the foot-board of the engine, and remaining there, was in the violation of any duty imposed upon him by law; nor is it conceded that, in so doing, he acted with less circumspection and care for his personal safety than would have been observed by prudent and ordinarily careful men under like circumstances. Indeed, this is the sharply controverted question in the case; and the question of negligence was therefore a question of fact

to be determined by the jury, upon consideration of all the facts and circumstances proved: *Southeastern Illinois R. R. Co. v. Connor*, 000 Ill. 000.

The test of plaintiff's right of recovery in this case was the exercise, by the deceased, of ordinary care,—that is, such care as a prudent and ordinarily cautious man would exercise for his personal safety,—and the failure of appellant to exercise such care, and that by reason thereof the injury and death occurred. It cannot be said, as a matter of law, that a prudent and ordinarily cautious man would not, under any circumstances, ride a short distance upon an engine. Experience has shown there is some danger in the safest mode of railway travel; and it cannot be said that one must not take a particular mode of carriage because it is dangerous. The question can only be determined, as before stated, by a consideration of all the attending circumstances.

In this case it is alleged in the declaration, and the jury have found, that the deceased had the right to be carried over the defendant's road to the stock-yards. There is evidence tending to show that when Forty-third Street was reached the caboose in which he had been riding was taken away, and his car of stock left standing on appellant's track; that it was the habit or custom of appellant to carry the attendants of stock from that point to the stock-yards, three fourths of a mile, on the stock-car or switch-engine which picked up the stock-cars dropped by appellant's trains at Forty-third Street, and took them to the stock-yards; that deceased had been engaged in shipping stock over appellant's road for several years; that no other mode of transportation was provided by appellant from Forty-third Street to the stock-yards; that the yard-master of appellant directed the engineer of the switch-engine to go and get the "drover" and his car of stock, which he did, at the same time directing the deceased to get on the engine; that in pursuance of such direction the deceased got on the foot-board of the engine. It appears, also, that after getting under headway, the speed of the engine was checked and the coupling-pin pulled, when the engine was thrown or "jerked" forward for the purpose of making a running switch. By the sudden and violent motion thus given to the engine, the deceased was thrown from the foot-board upon the track, and was run over by the car of stock from which the engine had just been detached, and so injured that death ensued.

In determining whether the deceased being upon the foot-

board was negligence, it became competent for the jury to consider, not only the acts of the deceased, but also the acts of the servants of the company, not alone in respect to their management of the train, but as connected with the acts complained of as negligence on the part of the deceased. There may be fault on the part of the carrier in putting the passenger in a place of unnecessary hazard, or in giving him assurance of safety and the like, which might render the apparent want of care of a passenger the negligence of the carrier. It is said in *Pierce on Railroads*, 329, that "the direction, invitation, or assurance of safety given by a servant of the company may so qualify a plaintiff's act as to relieve it of the quality of negligence which it would otherwise have. This has been more generally held in the case of passengers who are in charge of the company, and have a right to assume that its servants know what is safe. . . . But notwithstanding such direction, invitation, or assurance, the plaintiff will not be excused in following it, if the act involves a reckless exposure of himself, or is one which a man of ordinary prudence would not do." Deering, in his *Law of Negligence*, section 24, says: "One who obeys the instructions or directions of another upon whose assurance he has a right to rely, cannot be charged with contributory negligence at the instance of such other, in an action against him for injuries received in attempting to follow out the instructions"; citing in support of the text *Pennsylvania R. R. Co. v. McCloskey*, 23 Pa. St. 526; *Pennsylvania R. R. Co. v. Henderson*, 51 Id. 315; *St. Louis R. R. Co. v. Cantrell*, 37 Ark. 519; 40 Am. Rep. 105; *Louisville R. R. Co. v. Kelly*, 92 Ind. 371; 47 Am. Rep. 149; *Poole v. Chicago R'y Co.*, 53 Wis. 657; *Chance v. St. Louis etc. R'y Co.*, 10 Mo. App. 357.

In *Wilton v. Middlesex R. R. Co.*, 107 Mass. 108, 9 Am. Rep. 11, the plaintiff, a girl nine years old, was walking with other girls along defendant's track, and one of defendant's cars came slowly along the track, and the driver beckoned to the girls to get on, which they did. By a jerk of the car the plaintiff lost her balance, and fell and was injured. It was admitted in that case that plaintiff was not a passenger for hire. The court says: "In accepting the invitation and getting upon the car, we think she [plaintiff] was not a trespasser, there being no evidence of collusion between her and the driver to defraud the corporation. A master is bound by the acts of his servants in the course of his employment. . . . If, in violation of his instructions, he permits persons

to ride without pay, he is guilty of a breach of duty as a servant. Such act is not one outside of his duty, but is an act within the general scope of his agency, for which he is responsible to his master. In the case at bar the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently, she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions."

If the deceased, at the time of the accident, was in a place of peril, that fact was known to appellant's servants. If he was there by their invitation or direction, the law would require of them the exercise of a degree of care corresponding to the danger to which they had thus exposed him. The care ordinarily required of a carrier of passengers is to be measured by the known peril to the party it undertakes to carry. The proof shows that the making of a running switch is usually attended with danger, and would be especially so to persons standing upon the foot-board of the engine. This was known to appellant's servants, but is not shown to have been known by deceased. Nor is it shown that he knew or was told a running switch was to be made. It became the duty, then, of the servants of appellant to advise deceased of the facts before attempting the running switch, so that he might have taken extra precaution or have gotten off the engine before the switch was attempted. In this connection, the eighth instruction asked by appellant is as follows:—

"The jury are instructed that if they believe, from the evidence, that the said Nelson Brown got upon the car in question for the purpose of riding to the stock-yards, and that the engine was drawing a car loaded with stock, and that neither said engine or car was run or operated for the purpose of carrying passengers, then the defendant was not bound to run or operate said engine and car in any other than the usual and ordinary manner for the conveyance of stock, and the said Nelson Brown assumed the ordinary perils attending the operation of the same in the usual manner; and if the jury believe, from the evidence, that the same was operated in the usual and ordinary manner, and that the injury was the result of the usual and ordinary peril attending such operation,* then the plaintiff cannot recover."

Which instruction the court modified by inserting at the star the words, "and not through the carelessness and negligence of the servants of the defendant." The modification is

claimed to have been error. We do not think it was erroneous. As originally drawn, the instruction left out of consideration the question of defendant's negligence. There was evidence that attendants of stock were carried to the stock-yards on such trains, and that the deceased was upon this engine by direction of those in charge of it. The court might very properly, in view of this evidence, have refused this instruction altogether. If the train was not operated for the purpose of carrying passengers, yet if those in charge thereof assumed to carry the deceased thereon, and he was upon the same by their invitation and direction, it cannot be said, as a matter of law, they were not bound to operate the same in any other than the "usual and ordinary manner for the conveyance of stock." Under such circumstances, they were bound to operate the train in such manner as due care and caution would suggest for the safety of the passenger. Even if deceased was wrongfully upon the engine, and was permitted to remain there, that would not justify gross negligence in operating the engine and car, or the want of the exercise of ordinary care to prevent injury to him.

It is also urged that the court erred in refusing to admit evidence tending to show that the engineer or yard-master of appellant had no authority to allow persons, other than employees, to ride on engines or freight-cars of which they were in charge; and the second, third, fourth, and sixth of appellant's instructions related to this question, and were refused by the court, which is also assigned for error. The rules of the company were admitted in evidence. The private rules and regulations of a railway company, prescribing the duty and power of its servants and employees, cannot affect persons having no notice of them. It is said, in *Pierce on Railroads*, pages 277, 278: "The company is liable for the acts of its servants in the course of their employment, both in the rightful use and in the abuse of the powers conferred upon them; and when they keep within the course of their employment, it is responsible for their negligence or wrongful act, although they are acting against its instructions, or even willfully." See, to the same effect, *Wilton v. Middlesex R. R. Co.*, 107 Mass. 108; 9 Am. Rep. 11; 125 Mass. 130; *Higgins v. Watervliet Turnpike and R. R. Co.*, 46 N. Y. 23; 7 Am. Rep. 293; *Shea v. Sixth Avenue R. R. Co.*, 62 N. Y. 185; 20 Am. Rep. 480; *Cohen v. Dry Dock etc. R. R. Co.*, 69 N. Y. 170; *Jefferson R. R. Co. v. Rogers*, 38 Ind. 116; 10 Am. Rep. 103.

Those dealing with the company can only judge of the power given to its agents and its servants from appearances and the position and acts of such employees. Under the circumstances in this case, the deceased might well have supposed that those in charge of the switch-engine and his car of stock had authority from the company to act for it in the business in which they were engaged. There was evidence tending to show, as found by the jury and appellate court, as has been seen, that the deceased had a right to be transported over appellant's road to the stock-yards. On arrival at Forty-third Street this was but partially performed, and the engineer and switchman were carrying out and completing this contract of carriage, and were apparently in the discharge of that duty. Seeing the caboose-car, in which he had reached Forty-third Street, detached, and the switch-engine attached to his car of hogs, and it being the custom of appellant to take the shippers of stock upon such car or engine, he had the right to suppose, if he knew nothing to the contrary, that those in charge of the engine and of his stock were authorized to act for appellant. He was not bound, as a matter of law, to stop and inquire as to the extent of their authority to act: *St. Louis, Alton, and Chicago R. R. Co. v. Dalby*, 19 Ill. 353.

It is also urged that the trial court erred in admitting evidence of the custom of appellant in allowing shippers of live-stock to ride upon its engines and cars containing stock, from Forty-third Street to the Union Stock Yards. It is averred in the declaration that deceased had a right to be carried with his stock over appellant's road to the Union Stock Yards, and that he was rightfully, and by direction of appellant, by its servants, upon the foot-board of the engine, in transit to his destination, at the time of his injury. It is shown that usually a shipper's pass is given; but if, as part of the contract of shipment of stock, an attendant is to be carried, his right to passage would be as perfect if no pass was given as if that formality had been observed. The averment of the declaration is broad enough to admit any legitimate proof tending to show the right of the deceased to be upon the engine at the time of the alleged injury. If it was the usual custom or habit of the carrier to transport the shippers of live-stock in this way, and the deceased knew of such custom, we are not prepared to say that evidence tending to show the habit of the company in this regard would not be competent, as tending to show the authority of the servants of appellant in charge to

thus carry the deceased, as well as tending to show that the deceased, at the time of the accident, was a passenger for reward. We think the evidence was competent.

Appellant offered to prove there was a line of public street-cars from its tracks at Forty-third Street to the Union Stock Yards, which, upon objection, the court refused to allow. In view of the issue, this evidence was wholly immaterial. If the deceased had engaged passage on appellant's road to the stock-yards, and had a right to be carried there, as alleged, he was under no obligation, at his own expense, to pursue a different route. If the company furnished a dangerous mode, and if its servants in charge, with apparent authority, directed the deceased to take passage on its engine, it cannot escape liability for an injury to him through the negligence or carelessness of its servants, by showing that he might have procured passage by some other line of travel. It cannot be said that a party who engages passage on a freight train, and is injured while in the exercise of ordinary care, through the negligence of the servants operating the same, is chargeable with such contributory negligence as will defeat his right of recovery, merely because a passenger train or a street-car line might have afforded him a safer mode of travel. Assuming the deceased had a right to be safely carried by appellant to the stock-yards, he had a right to suppose that he would not be assigned to a place of extra hazard or peril, and that, to whatever place assigned, reasonable care would be exercised to protect him from injury: *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230; 13 Am. Rep. 570. It is manifest when deceased got upon the engine by direction of the servants of appellant, he did not know that a running switch was to be made, and also that the injury occurred in consequence of the attempt to make such switch. As we have seen, if he was in a hazardous position, and the danger to him was increased by the manner of the operation of the engine, he should have been informed in time to have enabled him to seek a place of greater safety, or to have left the engine.

What is here said will dispose of the alleged error in refusing defendant's seventeenth instruction, which was to the effect that if there was a street-car line that deceased might have taken to reach his destination, and he knew of it, and that he attempted to ride on the foot-board of the engine, and was injured, plaintiff could not recover. This instruction is objectionable in ignoring entirely the question of defendant's

negligence, and in assuming that the facts therein stated constitute, as a matter of law, such negligence as would preclude a recovery.

It is also urged the court erred in not allowing appellant to prove by Mr. Amsden that the position on the foot-board of the engine was dangerous. The witnesses Payne and Smith had both testified to that fact, and it was nowhere controverted in the case. The refusal, therefore, to permit appellant to accumulate evidence upon this point would not be a reversible error.

It is also urged that the court erred in giving the plaintiff's second and third instructions. Three objections are urged to these instructions: 1. That they authorize a recovery if the deceased was in the exercise of ordinary care while on the engine, excluding, it is said, a consideration of his negligence in placing himself in that position; 2. That the instructions assume that the defendant's servants were guilty of negligence in the running and handling of the engine; and 3. That they base the plaintiff's right to recover upon the negligence of defendant's servants in running and handling the engine, "without confining it to the specific negligence named in the declaration." None of the objections are tenable. The instructions are as follows:—

"2. The court instructs the jury, that if they believe from the evidence that Nelson Brown, the deceased, was rightfully on the defendant's engine, as is alleged in the declaration in this cause, and that while he was on said engine he was using ordinary care on his part for his personal safety, and was, by and through the carelessness and negligence of the defendant's servants in running and handling said engine, thrown from said engine and injured, from which said injuries the said Nelson Brown died, then the jury should find for the plaintiff, and give her such damages as they deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of the said deceased, not exceeding five thousand dollars.

"3. The court instructs the jury, that if they believe from the evidence that Nelson Brown, deceased, was the husband of the plaintiff in this suit, and that the said Nelson Brown was rightfully upon the defendant's engine by the invitation and direction of the conductor and manager of the same, and he was using ordinary care for his safety, and was, by and through the carelessness and negligence of the defendant's

servants in running and handling the said engine, thrown from the said engine to the ground, and run over by a car and injured, from which injuries the said Nelson Brown afterward died, then the jury will find for the plaintiff, and assess her damages at such sum as they believe, from all the evidence, she has sustained, not exceeding five thousand dollars."

The jury were required to find that the deceased was rightfully on the defendant's engine, as alleged in the declaration.

In respect to the second objection, the instructions under consideration went to the jury with many for appellant, among which (the sixteenth) was the following:—

"The jury are instructed, that if they believe, from the evidence, that a man of ordinary care and prudence would not ride upon a locomotive engine in the position and manner that said Nelson Brown was shown to have been riding at the time of the accident, and you further believe, from the evidence, that his injury was caused by his not exercising ordinary care and prudence, then the plaintiff cannot recover."

We do not think the jury could have understood plaintiff's instructions as holding that she might recover although her intestate was guilty of negligence in getting upon the foot-board of the engine, or remaining there up to the time of the accident, and especially so when considered in connection with the one above quoted and given for defendant. The question of the negligence of defendant was, by plaintiff's instructions, fairly submitted to the jury as a question of fact, to be determined from the evidence.

There is no force in the third objection. The negligence charged was in respect of the manner of running and operating the engine in making the running switch. The jury could not have understood these instructions, in the light of the evidence, as referring to any other acts of negligence than those charged in the declaration.

The refusal of the ninth instruction asked by appellant is also assigned for error. It was as follows:—

"The jury are instructed that the defendant was under no obligation to furnish the said Nelson Brown transportation from its track to the stock-yards, and in getting upon the engine used for the transportation of the car-load of stock, for the purpose of riding to the stock-yards, he assumed the ordinary risks and perils of that mode of travel, and if the jury believe, from the evidence, that his injury was the result of the usual

and ordinary peril attending such mode of travel, then the plaintiff cannot recover."

There was, at least, evidence tending to show that appellant was to carry the deceased to such yards, and the instruction was faulty in assuming the contrary as a matter of law. The instruction was modified by submitting the question of the obligation of appellant to furnish transportation of the deceased to the stock-yards, to the jury, to be found by them upon the evidence, and also submitting to the jury the question of the negligence of appellant in causing the injury to the deceased. In this there was no error.

The fifteenth instruction, as asked, was as follows:—

"The jury are instructed that if the said Nelson Brown intended to ride upon the engine or car, common prudence dictated that he should put himself in the safest place possible, and if the jury believe, from the evidence, that it was obvious to a person of ordinary prudence that the place where said Brown stationed himself to ride was much more dangerous than the position on the top of the car, then he was guilty of negligence, and the plaintiff cannot recover."

This instruction was modified, and given, and it is not claimed that the modification is erroneous, but it is said that the instruction should have been given as asked, and that its modification was therefore error. What would have been "the safest place possible," is a matter about which men equally prudent might widely differ. Therefore, what common prudence dictates in a particular case is ordinarily a question of fact. In addition to this, the instruction, as asked, wholly ignores the question whether the deceased did not take the position he did by direction of appellant's servants in charge of the train, and of their negligence in operating the same. The modification properly left the question of Brown's negligence, and that of the appellant, to the jury, to be determined by them from the evidence.

What has already been said will dispose of the modification made to appellant's nineteenth and twentieth instructions.

The first, second, third, fifth, sixth, seventh, fourteenth, seventeenth, and eighteenth instructions asked by appellant were refused, and the propriety of this ruling is also questioned. As already said, some of them proceed upon the theory that the acts of Brown, in being upon the foot-board of the engine, was such contributory negligence as would, as a

matter of law, prevent a recovery. What has been said will dispense with the necessity of their separate consideration. The first instruction, however, is as follows:—

“The jury are instructed that the evidence in the case will not sustain a verdict for the plaintiff, and their verdict should, therefore, be for the defendant.”

Such an instruction will not be given where there is evidence tending to prove the material facts necessary to maintain the issues for plaintiff, from which the jury may find the facts essential to a recovery. There being, as we have seen, evidence in this case tending to prove the issues on the part of the plaintiff, the court properly refused the instruction.

The second refused instruction, which was to the effect that if the jury believed, from the evidence, that the rules of the company forbade the engineer in its service to allow any person not in its employment to ride upon its engine, etc., then the deceased was not rightfully upon the engine, and the plaintiff could not recover; and also the third, fourth, and sixth of appellant's series, refused, have been heretofore considered. Each of these instructions ignored the knowledge of the deceased of the rules of the company, and of the apparent authority of the engineer to act in respect of the matter therein mentioned, and preclude a recovery, although the injury may have been the result of the gross negligence of the company, and the deceased may, under the circumstances shown by the evidence, have been in the exercise of ordinary care.

Appellant's fifth instruction is as follows: “It is alleged, and proved, that the deceased undertook to ride on defendant's engine from the main line of defendant's road to the Union Stock Yards; the court instructs you, as a matter of law, that in this position he was not a passenger on defendant's train, and could not claim any of the rights of a passenger; and it will make no difference that the engineer's helper invited or permitted him to ride on the engine. If he did permit or invite him to do so, he knew it was not the place furnished by the defendant company for passengers to ride, and in taking that position he assumed all the risks and perils incident to that method of travel.”

It cannot be said, as a matter of law, that the deceased was not a passenger on the defendant's train. Whether he was a passenger depended upon the facts proved. If the company gave the deceased a pass to the stock-yards, or engaged to take him there over its road, and its servants, clothed with

apparent authority to act for the company in that regard, directed him to take passage on the engine, and undertook to carry him on the same, these facts were proper to be considered by the jury in determining whether the deceased was a passenger, or not. While the company may not, upon their freight trains or locomotives, ordinarily take passengers, or hold them out to the public for that purpose, yet if the company, through its authorized agents, accept a passenger for reward upon such trains or engines, there is neither reason nor authority for holding that they are not bound to exercise reasonable care and diligence for the safety of such passengers. The instruction was properly refused.

The seventh instruction was properly refused, because it made the plaintiff's right of recovery depend upon the authority of the switchman or engineer to direct the deceased to take passage upon the engine, without reference to his apparent authority, and whether the deceased knew of such want of authority, or not.

Appellant's fourteenth instruction is substantially identical with the fifteenth, as asked, which has been heretofore considered, and, for the reason there assigned, was properly refused. Whether the position occupied by him upon the foot-board of the engine was not absolutely the safest place he could occupy upon that train matters not, if he was not, under the circumstances, shown guilty of negligence in accepting it. It does not necessarily follow that a passenger guilty of some negligence, slight in its character, cannot recover for the personal injury resulting from the gross negligence of the carrier: *Chicago and Alton R. R. Co. v. Johnson*, 116 Ill. 206; *Calumet Iron and Steel Co. v. Martin*, 115 Id. 358; *United States Rolling Stock Co. v. Wilder*, 116 Id. 100. This instruction, also, entirely ignores the alleged carelessness or negligence of appellant's servants in operating the engine. The same objection obtains to appellant's eighteenth refused instruction.

Taking into consideration the peculiar facts of this case, to which the law has been applied by the trial court with substantial accuracy, we find no such error in the record as will authorize a reversal, and the judgment of the appellate court will therefore be affirmed.

PERSON RIDING IN DANGEROUS PLACE BY INVITATION OF SERVANTS OF RAILROAD COMPANY is entitled to same care as if he were in a proper place on a passenger train: See *Magee v. Missouri Pacific R'y Co.*, 1 Am. St. Rep. 706, where plaintiff rode upon a freight train at the invitation of the conductor;

and *International etc. R. R. Co. v. Cook*, 2 Id. 521, where plaintiff rode upon a hand-car as a passenger at the invitation of those who were managing it. A person taking passage on a freight train, with knowledge of risks and inconveniences, is bound to be more careful in guarding against injury than he would be in traveling upon ordinary passenger-cars: *Wallace v. Western N. C. R. R. Co.*, 2 Am. St. Rep. 346.

PASSENGER IS NOT AFFECTED BY PRIVATE RULES FOR GUIDANCE OF EMPLOYEES of railroad company, unless they are brought to his notice: See *McGee v. Missouri Pacific R'y Co.*, 1 Am. St. Rep. 706.

SLIGHT CONTRIBUTORY NEGLIGENCE, WHICH IS NOT CLEARLY SHOWN to have contributed to the injury, will not defeat plaintiff's right to recover, where defendant has been grossly negligent: *Wichita etc. R. R. Co. v. Davis*, 1 Am. St. Rep. 275.

VILLAGE OF DES PLAINES v. POYER.

[123 ILLINOIS, 348.]

MUNICIPAL CORPORATION MAY NOT DECLARE THAT TO BE A NUISANCE WHICH IN FACT IS NOT, though it is by law empowered to declare what shall be a nuisance.

QUESTION WHETHER A THING IS A NUISANCE MUST BE SETTLED AS A QUESTION OF FACT, AND NOT OF LAW.

NUISANCES. — PUBLIC PICNICS AND DANCES ARE NOT IN THEIR NATURE NUISANCES; and an ordinance declaring them to be nuisances is void.

PROSECUTION against the defendant for violating the ordinance set forth in the opinion. Judgment for defendant.

Stiles and Lewis, and C. S. Cutting, for the appellant.

John Gibbons, for the appellee.

SCHOLFIELD, J. The only question involved in the present case is the validity of the following ordinance:—

"Sec. 1. That all public picnics and open-air dances within the limits of said village are hereby declared to be nuisances.

"Sec. 2. That for any person or persons to rent, use, or allow to be used, any yard, ground, grove, or other real estate within the corporate limits of the village of Des Plaines, for public picnic purposes, or for open-air dances, or to permit or in any way allow the use of such property for any purpose by which disorderly persons are gathered in or about said village of Des Plaines, shall constitute and is hereby declared to be a nuisance. Any person creating or permitting any nuisance mentioned and declared in this ordinance to exist, having the right or power to abate the same, shall be subject to a fine of not less than fifty dollars, and not exceeding one hundred dollars, in every case; and each renting, using, or allowing to be used, of any such premises for the purposes aforesaid, or

any of them, shall be deemed the creating of a new nuisance, and the author thereof be subject to a like fine."

The village is incorporated under the general law in relation to the incorporation of villages, and is by that law empowered to declare what shall be a nuisance; but this does not authorize the village to declare that a nuisance which is not so in fact: Wood on Nuisances, p. 773, sec. 740; *Chicago v. Laflin*, 49 Ill. 172; Dillon on Municipal Corporations, 3d ed., sec. 374.

It was said in *Town of Lake View v. Letz*, 44 Ill. 81: "There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character, in this respect, depending on circumstances." And in the latter instance it is manifestly beyond the power of the village to declare in advance that those things are a nuisance, and so it was held in that case. The question when the thing may or may not be a nuisance must be settled as one of fact, and not of law.

That public picnics and public dances are not in their nature nuisances, we think is quite clear. They are not in the list of common-law nuisances enumerated in the text-books: See 4 Bla. Com., Sharswood's ed., 166, 167, et seq.; 1 Hawk. P. C., Curwen's ed., 694; Wood on Nuisances, p. 32, secs. 23 et seq. Nor is there anything necessarily harmful in the nature of either more than in that of any other public amusement. When conducted with proper decorum and circumspection, and remote from public thoroughfares, it is impossible to conceive how any public injury or annoyance can result. That the manner of conducting them may be productive of annoyance and injury to the public is not to be questioned; but since the nuisance must consist in this, and not in the picnic ordinance of itself alone, the ordinance should be directed only to it.

While the rights of the people to be free from disturbance and reasonable apprehension of danger to person and property are to be respected and jealously guarded, the equal rights of all to assemble together for health, recreation, or amusement in the open air are no less to be respected and jealously guarded. Because a privilege may be abused is no reason why it shall be denied. We concur in the views expressed by the appellate court when the case was before it: *Poyer v. Village of Des Plaines*, 22 Brad. App. 584.

The judgment is affirmed.

SNELL v. SNELL.

[123 ILLINOIS, 403.]

HOMESTEAD RIGHT CONSTITUTES A FREEHOLD, within the meaning of a statute granting a right of appeal in cases where freehold estates are involved.

CONTRACTS OF MARRIED WOMEN WERE VOID AT COMMON LAW AND IN EQUITY, so far as imposing personal obligations is concerned, though such contracts might, subject to certain limitations, bind their separate estate.

MARRIED WOMEN AND MARRIED MEN ARE PLACED ON THE SAME FOOTING, by the statutes of Illinois, with respect to all property rights, including the means to acquire, protect, and dispose of the same; and the duties and obligations of married women, in respect to these rights and powers, are the same as others *sui juris*.

MARRIED WOMEN MAY, IN ILLINOIS, BE COMPELLED TO CORRECT A MISTAKE which has occurred in the execution of a deed; and such deed, if duly executed, may be reformed in equity by correcting a mistake in the description of property therein, so as to make such deed express what the parties intended it should.

R. C. Hitt, for the appellants.

Duncan, O'Connor, and Gilbert, for the appellees.

MULKEY, J. On the twenty-sixth day of January, 1881, Philip Snell was the owner in fee of the land in controversy, and resided thereon, with his family, as a homestead. On that day he mortgaged the same to Jane Snell, to secure an indebtedness of \$1,839.87, his wife, Ellen J. Snell, joining in the deed. The land lay in section 27, but by mistake it was described as in section 20. The mortgage contained a proper and formal release of the homestead, and was in every respect strictly accurate, except the error as to the number of the section. On the ninth day of February, 1884, Snell and wife executed to the Northwestern Mutual Life Insurance Company another mortgage upon the same land, by its proper description, to secure an indebtedness of three thousand dollars. This mortgage also contained a release of homestead, and was otherwise formal and correct. On the 16th of August, 1884, Snell died, leaving Ellen J. Snell, his widow, and two minor children, John and William Snell, his only heirs at law. On the 20th of October, 1885, Jane Snell filed a bill in the La Salle circuit court to correct her mortgage in respect to the erroneous number of the section, and to have the same foreclosed, making the widow and two minor children of Philip Snell parties. The former made default, and the children answered in the usual way, by a guardian *ad litem*, no ques-

tion being raised, the one way or the other, about the right of homestead. The court, on the hearing, entered a decree in conformity with the prayer of the bill. On the 1st of December, 1886, the master sold the premises, under the decree, to Byron D. Snell, and the same not having been redeemed within the time allowed by law, Snell received a master's deed therefor. On the ninth day of February, 1887, the widow and heirs of Philip Snell, the appellees herein, filed the present bill, claiming an estate of homestead in the premises, and prayed that the same be set off and assigned to them, as provided by law. The court, on the hearing, entered a decree in conformity with the prayer of the bill, and the defendants bring the case here by appeal.

Before proceeding to consider the merits of the controversy, it will be necessary to dispose of a preliminary question which challenges the jurisdiction of this court.

The case is brought here on the hypothesis that it involves a freehold. This is denied by appellees' counsel. They insist that a homestead right does not, in any case, constitute a freehold estate; otherwise one could not have such a right where he has a leasehold merely; and that as respects minor children, upon whom a homestead often devolves, their interest can never exist beyond a definite number of years, which is inconsistent with the idea of a freehold. The *rationale* of the argument, as we take it, is, that because the estate of homestead is of a fixed and uniform value, the quantity of interest (using that term in its technical sense) must, therefore, necessarily be the same in all cases, which makes it more in the nature of an encumbrance than anything else, and hence it is concluded that cases involving a homestead must, for jurisdictional purposes, be placed in the same category with foreclosure suits, which are uniformly held not to involve a freehold. However plausible the argument may be, we do not regard it as sound. It is directly in conflict with the conclusion reached in *Browning v. Harris*, 99 Ill. 456, where will be found a full expression of our views on this subject. If, as is contended, appellees' claim of homestead is wholly unaffected by the mortgages from Snell and wife to Jane Snell, and to the Northwestern Mutual Life Insurance Company, and the subsequent proceedings in court founded thereon, it is clear, from the case just cited, that upon the death of Philip Snell his widow took a life estate, for the use of herself and children, to the extent of one thousand dollars, in the mortgaged prem-

ises; and it is hardly necessary to add that a life estate in land is, by all the authorities, a freehold estate. Not only so, but appellees have in this very case obtained a decree, directing, if it can be done without injury to the estate, that there be set off and assigned to them a part of the mortgaged premises, not exceeding one thousand dollars in value, to be held by the widow in severalty, for the use of herself and children as a homestead. When so assigned she would clearly have, for the use of herself and children, an estate for life in the premises, which, of course, would be a freehold estate. If, in the opinion of this court, that decree, under the facts in the case, was unwarranted, and appellees shall ultimately fail in their suit, it is clear they will simply lose the freehold which the lower court directed to be assigned to them, and, per consequence, it will be gained by the adverse party. This, according to the rule laid down in *Chicago etc. R. R. Co. v. Watson*, 105 Ill. 217, and which has been invoked by appellees' counsel, demonstrates that a freehold is involved in this suit. There is another aspect of the case from which the same result might be reached, but it is not necessary to pursue the subject further. The motion to dismiss must be overruled.

Coming now to the merits of the case, it may somewhat aid us to advert hastily, and in a general way, to the legal disabilities of married women, as they existed here and in England before the commencement of the reform legislation which has resulted in so radical a change in the present law on the subject. Their contracts, by the common law, as it existed in England and in this state prior to the comparatively recent legislation on the subject, commencing in 1861, were absolutely void at law, and were equally so in equity, so far as imposing any personal obligation is concerned. They might, however, by such contracts, subject to certain limitations, bind their separate estate, but they imposed no personal obligation whatever. The right of a married woman to have a separate estate in personal property was purely a creature of equity, and the power to bind it (the estate, not herself), by a contract fairly entered into in respect to the estate, and on her own account, was regarded as a mere incident of such ownership. As her contract imposed on her no personal obligation, either at law or in equity, it therefore followed, as a logical result and legal sequence, that a bill would not lie to reform a contract or conveyance alleged to have been made by a married woman. As a conveyance of land by deed was a

species of contract, it followed that an instrument executed by a married woman purporting to convey real property was absolutely void, both at law and in equity, and consequently could not be enforced or reformed. While at common law a married woman could not convey her own real estate, or release her inchoate right of dower or other interest in the lands of her husband, yet she might, through the instrumentality of a fictitious suit, called a fine or fine and recovery, permit another to recover whatever right she had in the land proposed to be conveyed, and thus, by a species of estoppel, bar her rights. At common law this was the only mode by which a married woman could dispose of her own lands, or any interest she might have in those of her husband. This cumbrous and expensive mode of conveying her interests in real property was abolished by an act of the British Parliament (3 & 4 Wm. IV., c. 74), under the provisions of which the wife was enabled to accomplish the same ends as she has been able to do here from a very early period, by joining her husband in an ordinary deed of conveyance, subject to certain prescribed formalities, which, in all cases, had to be strictly complied with. But these statutory enactments, which enabled a married woman to make a valid transfer or conveyance of real property, did not at all affect her disabilities in other respects. As to her, the deed only operated as a conveyance; therefore all covenants contained in it were in law the covenants of the husband only. It followed that if her deed was not sufficient on its face to pass her property, there was no relief but to induce her to make another; and if she declined to do so, equity would not compel her, nor would it reform the instrument, for such a suit could not in any case be maintained for either purpose, except upon the theory that a contract for a deed had existed between the parties. This of course could not be done in the case of a married woman, for the simple reason she could not make such a contract, nor, indeed, any at all; and of this the court would take judicial notice. It is therefore undoubtedly true that prior to the modern legislation in this state respecting the legal disabilities of married women, a court of equity had no power or authority to reform any alleged contract or conveyance made by a married woman, and in the case of a conveyance, it made no difference whether it related to a homestead or some other interest in land. All her conveyances, without regard to the character of the estate or interest granted, stood upon a common footing, and were

controlled by the same principles. If they conformed to the requirements of the statute, she was bound by them; if not, they were void, and could not be enforced. The only difference in conveying a homestead and any other interest or right in land was in the form of the deed, and the disposition of courts to liberally construe the act in favor of the homestead occupant.

The law, however, in respect to the rights and disabilities of married women, has of late years undergone a radical change. By the acts of 1861, 1869, and 1874, married women are to-day, and were at the time of the execution of the mortgages in question, placed upon a common footing with married men in respect to all property rights, including the means to acquire, protect, and dispose of the same. They may own, buy, sell, transfer, and convey any and all kinds of property, to the same extent as married men or single women may, and subject to no other or different conditions or restrictions. Not only so, but their duties and obligations in respect to these rights and powers are the same as those of others *sui juris*. Like other persons, they must perform their contracts; and if they fail to do so, they are amenable to legal process to the same extent as if they were unmarried. If, in the execution of a deed by a married woman, a mistake occurs, so that it does not truly state the contract between the parties, a court of equity will correct it against her, just as readily as it would against any other person. The only difference in respect to conveyances of husband and wife is, that any conveyance good at common law will pass his estate, whether his wife joins him in it or not, and the fact that it is not acknowledged before an officer will make no difference; whereas in the case of the wife, the statute requires that either the husband must join her in the deed, or, if executed by her alone, that it be acknowledged before some officer. Of course, this requirement of the statute is mandatory, and if not complied with, the deed would be invalid. Nevertheless, in such case a court of equity, upon a proper showing in other respects, would compel the delivery of a deed executed in proper form. In the present case there was a simple, manifest mistake in the body of the deed in describing the land. The homestead was formally released and waived, as required by the statute, and the only effect of correcting the error in the description of the property was to make the deed express just what the parties to it originally intended it should. The appellees were par-

ties to the decree reforming the deed. The court had jurisdiction of their persons. This is not denied. That the correction of mistakes in deeds and other written contracts executed by persons *sui juris* is a part of the ordinary jurisdiction of courts of chancery, is beyond dispute. So it is not perceived why appellees are not bound by that decree. And if it be given effect (as we hold it must), it follows that appellees have no homestead in the premises, and the decree in the cause was consequently erroneous, and should be reversed for that reason.

The decree of the court below is reversed, and the cause remanded for further proceedings in conformity with this opinion.

PROPERTY RIGHTS OF MARRIED WOMEN AS AFFECTED BY AMERICAN STATUTES: See note to *Kirkpatrick v. Buford*, 76 Am. Dec. 366-401.

AT COMMON LAW, CONTRACTS OF MARRIED WOMEN WERE VOID, AND NOT ENFORCEABLE: *Dobbin v. Hubbard*, 65 Am. Dec. 425; but under the various statutes, the powers of married women to contract have been variously extended: See the note to *Kantrowitz v. Prather*, 99 Id. 599-610.

REFORMING DEED OF MARRIED WOMAN. — The chief point of interest in the principal case is its declaration that equity may reform the deed of a married woman, in those states where they are by statute given power to contract and to convey, but where their conveyances are inoperative unless executed and acknowledged in some prescribed manner. If a court of equity corrects or reforms a deed as against a married woman, it is quite evident that the deed, as corrected, has never been executed and acknowledged in the mode prescribed. Take the principal case as an illustration. There a married woman executed and acknowledged a deed for lands in section 20; but the court, in effect, corrected that deed, and made it convey lands in section 27. Thus she was made to convey lands in the conveyance of which her husband did not join, and she never did, after being informed of the contents of the conveyance as corrected, acknowledge, on examination before any officer, that she executed the same. While the rule of the principal case seems to compel the execution of a deed to which a *feme covert* did not assent in the form prescribed by law, it is supported by the preponderance of the authorities on the subject: *Gardner v. Moore*, 51 Am. Rep. 454; *Styers v. Robbins*, 76 Ind. 547; *Hamar v. Medsker*, 60 Id. 413. These authorities proceed upon the assumption that the deed, as corrected, is the one which the parties undertook to execute; that the wife intended, in the first instance, to assent to the deed as corrected, and that she had all the protection which the statute intended to accord her.

The rule in California is otherwise. There a married woman cannot be compelled to reform a deed by inserting therein property omitted by mistake: *Leonis v. Lazzarovich*, 55 Cal. 56; see also note to *Tiernan v. Poor*, 19 Am. Dec. 230. She cannot be bound by any deed which she has not executed and acknowledged in the mode prescribed by statute; but if the officer taking the acknowledgment does not certify to the same correctly, a proceeding may, by statute, be maintained to compel his certificate to be so corrected as to speak the truth: *Wedel v. Herman*, 59 Cal. 507.

OHIO AND MISSISSIPPI RAILWAY CO. v. WACHTER.

[123 ILLINOIS, 440.]

DAMAGES ARE RECOVERABLE BY A LAND-OWNER AGAINST A RAILWAY COMPANY FOR MAINTAINING AN INSUFFICIENT CULVERT in an embankment, whereby his lands are flooded, although damages may have been recovered by plaintiff or his grantor for the location of the road, because the damages then recoverable were to be estimated upon the theory that the road would be constructed and maintained in a reasonably proper and skillful manner.

DAMAGES RECOVERABLE IN EMINENT DOMAIN PROCEEDINGS TO ACQUIRE A RIGHT OF WAY FOR A RAILWAY are such as may result from building and operating the road in a reasonably proper and skillful manner, so as to avoid the infliction of all loss and injury not necessarily resulting from thus building and operating the road. Hence, if the road is not so built or operated, the owner of the land at the time of any injury accruing from the want of proper skill and care may recover therefor.

Pollard and Werner, for the appellant.

W. C. Kueffner, for the appellee.

MULKEY, J. This is an appeal from the appellate court for the fourth district, affirming a judgment of the circuit court of St. Clair County in favor of Michael Wachter, the appellee, against the Ohio and Mississippi Railway Company, the appellant herein, for the sum of six hundred dollars and costs. The form of the action was trespass on the case. The first count charges "that the plaintiff, at the time of the alleged grievances, was the owner and in possession of a certain brickyard, with certain property situate thereon, in the town of O'Fallon, in St. Clair County, near which the defendant's railroad was operated, and which crossed a natural watercourse; that defendant had constructed and did unlawfully maintain a certain solid earth embankment across said watercourse, about twenty feet in height, which obstructed the natural flow of the water, and forced it back upon adjoining lands; that defendant had constructed and was maintaining a culvert through the embankment, which was utterly insufficient to permit the free passage of water which, in ordinary floods and freshets, would naturally flow in said watercourse and seek passage through the said culvert; that on or about June 20, 1885, a heavy rain storm set in, and a large quantity of rain-water naturally fell upon the lands adjoining said watercourse, and said water naturally was drained and ran into said watercourse, and would have escaped and run off without damage to the plaintiff but for said embankment, but that

said water was stopped by said embankment, and owing to the insufficiency and inadequacy of said culvert, and opening in said culvert, was prevented from passing off in its natural course, and forced back upon and flooded his brick-yard and property thereon, to his great damage."

The second count is substantially the same as the first, except that the negligence imputed to the defendant is its suffering the culvert to become choked up with obstructions, causing the water to back up and overflow the plaintiff's property. The third count charges that the defendant wrongfully and unlawfully constructed and maintained the levee, without leaving a sufficient opening for the water to pass through the embankment. In other respects it was like the first and second. The defendant interposed the plea of not guilty, and upon this issue alone the cause was tried before the court and a jury, with the result already stated.

No exception was taken on the trial to any ruling of the court upon the admissibility or exclusion of evidence, and while we find exceptions were taken to the court's rulings upon the instructions, and that such rulings were assigned in the appellate court for error, we may assume this was done merely *pro forma*, for no objection to the instructions is urged in appellant's argument, or even so much as suggested. Not perceiving any objections ourselves to the instructions of which the appellant can complain, no discussion of them is called for, or could well be made.

Upon an examination of the record in the appellate court, we find there was a simple affirmance of the judgment of the trial court, without any finding of the facts by that court. In its opinion, however, there were questions — or rather a question — involved in the case of sufficient importance to certify the cause to this court, which it has accordingly done. As just indicated, that court has appended to its certificate the specific grounds upon which the appeal was granted. That, however, we regard as merely advisory, for the reason the statute did not require it. Yet in many cases, if not in this, such a statement, though not required as a matter of duty, might subserve a good purpose by directing the attention of this court to the particular features of the case which, in the opinion of that court, were not regarded as free from question. Nevertheless, whenever a case is brought from the appellate court to this upon a certificate, it is here, as if brought in the usual way, for all purposes. In either case, this court is re-

quired to consider such questions, and such only, as arise upon the record, and which it is by law authorized to determine. To ascertain what questions do thus arise, we look to the pleadings, the rulings of the court, and the orders in the cause, and not to the certificate of the appellate court allowing the appeal.

Viewing the present record in this light, it is not clearly perceived that anything remains for this court to do but simply to affirm the judgment, unless it were able to say, as matter of law, that the declaration discloses no cause of action,—this being always a question open to consideration in a court of review, when it falls within any of the assignments of error. While there is no direct claim of this kind made, yet the question that appellant now asks us to consider, and which is the only one discussed in the brief filed by its counsel, seems to assert as much. Upon this view, therefore, it may not be improper to consider it. The question or proposition, as formulated by counsel, is: "The injury caused by the construction of an insufficient culvert in a railroad embankment is immediate and permanent, giving rise to but one cause of action."

Counsel have cited, in support of the proposition, the following authorities: *Ottawa Gas Co. v. Graham*, 28 Ill. 73; 81 Am. Dec. 263; *Illinois Central R. R. Co. v. Grabill*, 50 Ill. 241; *Chicago etc. R. R. Co. v. Stein*, 75 Id. 42; *Toledo etc. R'y Co. v. Morgan*, 72 Id. 155; *Chicago etc. R. R. Co. v. Maher*, 91 Id. 312; *Decatur Gas Co. v. Howell*, 92 Id. 19; *Chicago etc. R. R. Co. v. Loeb*, 118 Id. 203; 59 Am. Rep. 341; *Wabash etc. R'y Co. v. McDougall*, 118 Ill. 229; *Chicago etc. R. R. Co. v. McAuley*, 121 Id. 160,—none of which, in our judgment, sustain it.

The statement is not accurate as an abstract proposition, and even if it were, it is but in part applicable to facts of the case, and is inconsistent with the theory upon which it was tried by both parties. Considered as a general proposition, it should at least be limited to the case of a railroad built under authority of law, and in a reasonably proper and skillful manner, so as to avoid the infliction of all loss and injury not necessarily resulting from thus building and operating the road. The proposition, as formulated, assumes that a railroad company has the right to construct and operate its road just as it pleases, without regard to whether the method adopted is sanctioned by good railroading, or not; that it may

build indifferent culverts, or none at all, over drains and streams on the line of its road, and by thus disregarding the ordinary rules observed in such cases, inundate and overflow, in time of freshets, large bodies of land and other property, without incurring any other or different liability, except as to extent of damages, than that of a company which, under like circumstances, has constructed its road-bed and culverts in strict conformity with the well-recognized and approved methods of railroad-building. We do not concur in this view.

The decisions of this court above cited, as we understand them to go to the length of holding that all special damages, present and prospective, to the owners of lands, resulting or to result from properly constructing, maintaining, and operating a railroad under the laws of this state, constitute, as to such land-owner, one single, indivisible cause of action, which may be enforced under the eminent domain act, or any other appropriate form of action. As a corollary of this doctrine, these cases further hold that where, after such right of action has once accrued, the owner of land thus injured conveys it to another, the latter can maintain no action for any damages he may subsequently sustain, which would have been anticipated and allowed as prospective damages in any suit which his grantor might have brought in his own name. But this court has never held, nor is it prepared to hold, that a railroad company is not liable for damages resulting from its negligence, either in the construction, maintaining, or operating its road. To do so would be to introduce an anomaly in the law of this state, and offer a premium for negligence and a willful disregard of duty.

A railroad company cannot take, even by making compensation, more land than is reasonably necessary for the purposes of its road. This is universally conceded. The same principle must be applied to the damaging of property, for to permanently damage it is practically taking it to the extent its uses are impaired, though not a taking in the limited sense in which that term is used in our statute. Public health and convenience, as well as the positive law of the state, alike demand that railways leading over natural streams and drains should, by means of efficient and substantial culverts, or otherwise, be so constructed as to admit the escape of accumulating waters through them, in times of high water as well as low. But experience shows that even these pre-

cautions which the law requires to be observed are often not sufficient to entirely protect adjacent property owners; hence the constitution of the state has expressly provided for compensation in such cases. But the providing of such compensation for unavoidable injuries to property was clearly never intended to license companies to overflow vast bodies of land which might be fully protected by the building and maintaining proper culverts. Now, in a case of this kind, when the company commences operating its road without having built such culverts, or provided some other efficient means for the escape of the water, is it thereby relieved of the duty of doing so altogether? To say this is to assert that one may discharge a legal duty by utterly disregarding it, which is simply absurd. To maintain an embankment of a road in that condition is not only a violation of a public duty, but is a direct invasion of the private rights of the owners of the lands thus constantly menaced by overflows which could never reach them if the road-bed were properly constructed.

To the suggestion that the company may be compelled to pay for this constant menace and consequent depreciation of the value and use of the land in times of overflow, it is sufficient to say that he is under no obligation to submit to a partial loss which could be avoided by the performance of a legal duty that the company owes to him. It is, in effect, forcing one to sell his property under the forms of law, in the absence of any public necessity justifying it. The remedy is to compel the company to properly construct its road, and until that is done, hold it responsible for all damages resulting from such failure of duty.

There are decisions to the effect that where, in a case like this, the plaintiff has treated the injury as embracing prospective as well as present damages, and has offered proof in support of such claim, there can be no further recovery. These decisions rest upon the principle of estoppel, and are consequently sound; but no such question arises in this case. Yet it does not follow that because a land-owner, under the circumstances suggested, would be estopped from bringing a second suit, the company would be relieved of the public duty to properly construct and maintain its embankment, and it would therefore continue liable to all persons injured by its failure to do so, except such as might be estopped, in the manner we have stated, from enforcing a claim of that kind.

The judgment will be affirmed.

WHAT DAMAGES RECOVERABLE BY LAND-OWNER FOR INJURIES RESULTING FROM THE MAINTENANCE AND OPERATION OF RAILWAYS AND LIKE PUBLIC IMPROVEMENTS, ALTHOUGH THE RIGHT TO MAINTAIN SUCH ROADS OR IMPROVEMENTS HAS FIRST BEEN SECURED IN EXERCISE OF RIGHT OF EMINENT DOMAIN. — *In General.* — In awarding compensation for the taking of private property for public use by right of eminent domain, the appraisal will properly embrace all past, present, and future damages which the improvement occasions, or may thereafter reasonably produce: *Sawyer v. Town of Keene*, 47 N. H. 173, 179; *Railroad Co. v. Pope*, 62 Tex. 313. Thus in assessing damages done to land by reason of the appropriation of a right of way through it for a railroad, the viewers or jury may always take into consideration all incidental loss, inconvenience, and damages, present and prospective, which may be known, or may reasonably be expected to result from the construction and operation of the road in a legal and proper manner: *Missouri etc. R. R. Co. v. Haines*, 10 Kan. 439. But any damages caused by an improper construction of a railroad, or damages which may possibly result from its negligent or unskillful operation, cannot lawfully be included in such assessment: *Neilson v. Chicago etc. R. R. Co.*, 58 Wis. 516; *Setzler v. Pennsylvania etc. R. R. Co.*, 112 Pa. St. 56; *King v. Iowa Midland R. R. Co.*, 34 Iowa, 458; *Miller v. Keokuk etc. R. R. Co.*, 63 Id. 680. The rule is, that if the public work is built so as to cause unnecessary damage by want of reasonable care and skill in its construction or operation, then the right of eminent domain will not protect the parties by whom the work is done, but they may be liable in tort for such unnecessary injury: *Mellen v. Western Railroad*, 4 Gray, 303; *Wheeler v. City of Worcester*, 10 Allen, 591; *Brewer v. Boston etc. R. R. Co.*, 113 Mass. 52, 58; *Spencer v. Hartford etc. R. R. Co.*, 10 R. I. 14; *Pittsburg etc. R. R. Co. v. Gilleland*, 56 Pa. St. 445; *Tibbetts v. Railroad Co.*, 62 Me. 437; *Waterman v. Connecticut etc. R. R. Co.*, 30 Vt. 610; *Railroad Co. v. Hambleton*, 40 Ohio St. 496; *Bridgers v. Dill*, 97 N. C. 222; *New Orleans etc. R. R. Co. v. Brown*, 64 Miss. 479; compare *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541; 4 Am. St. Rep. 659.

Interference with Lateral Support of Land. — It is an established rule of law that the owner of land has a right to have the soil of his premises sustained by the lateral support of the natural soil of the adjoining land, this right being limited, however, to the soil in its natural state: *City of Quincy v. Jones*, 76 Ill. 231; *Gilmore v. Driscoll*, 122 Mass. 199; 23 Am. Rep. 312; *Lasola v. Holbrook*, 4 Paige, 169; 25 Am. Dec. 524. No person is therefore entitled to dig so near the land of another as thereby to withdraw the natural support of the soil, and render it liable to break away and slide down of its own weight: *Boothby v. Androscoggin etc. R. R. Co.*, 51 Me. 318. And this principle has been applied to the case of excavations made in constructing public works under authority of law. Thus a railroad company was held liable in damages for injury caused by excavating on its own land so near to the land of an adjoining owner that the soil of the latter, in its natural state, caved into the excavation made: *Richardson v. Vermont Central R. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283; *Ludlow v. Hudson River R. R. Co.*, 6 Lans. 128. On the other hand, the right to recover damages in such cases is denied, and the principle is asserted that where a railroad company does only what it is authorized to do, and is without fault or negligence, it is not liable for consequential damages: *Boothby v. Androscoggin etc. R. R. Co.*, 51 Me. 318. It is held not to be incumbent on the railroad company to construct a wall or erect any defenses for the protection of the adjoining property from the consequences resulting from a proper and reasonable use of the way for its road,

although such consequences would be injurious, and inevitably so, to the adjoining owner: *Hortsman v. Lexington etc. R. R. Co.*, 18 B. Mon. 218. So, according to many decisions, a municipal corporation may grade and change the grade of streets, from time to time, when necessary, without protecting the earth or embankments of the adjoining owners, and is not liable for the consequential damage caused to them in adapting their land to the grade and protecting it: *Cheever v. Shedd*, 13 Blatchf. 258; *Mitchell v. City of Rome*, 49 Ga. 19; *Radcliff v. Mayor etc.*, 4 N. Y. 195; *Fellows v. City of New Haven*, 44 Conn. 240; 26 Am. Rep. 447, and see note 457. But see, as favoring the opposite view, *Broadwell v. City of Kansas*, 75 Mo. 213; 42 Am. Rep. 406; *Hendershott v. City of Ottumwa*, 46 Iowa, 658; 26 Am. Rep. 182; *Keating v. Cincinnati*, 38 Ohio St. 141; 43 Am. Rep. 421; *Dyer v. St. Paul*, 27 Minn. 457. As to the liability imposed by statute or organic law, attaching to a municipal corporation for consequential damages to adjoining property, resulting from a street improvement done by it in a lawful manner and without malice, see *City Council v. Townsend*, 80 Ala. 489; 60 Am. Rep. 112; *Reardon v. San Francisco*, 66 Cal. 492; 56 Am. Rep. 109; *City of Elgin v. Eaton*, 83 Ill. 535; 25 Am. Rep. 412; *City of Reading v. Althouse*, 93 Pa. St. 400; *Johnson v. Parkersburg*, 16 W. Va. 403.

Damages from Blasting, etc. — It is held that damages done by a railroad company to land adjoining the line of its road by blasting rocks in a proper manner should be estimated in the original award, and that a separate action will not lie therefor: *Dodge v. Commissioners etc.*, 3 Met. 380; *Whitehouse v. Androscoggin R. R. Co.*, 52 Me. 208; *Brown v. Providence etc. R. R. Co.*, 5 Gray, 35; but for blasting at improper seasons, thereby causing unnecessary damage to crops, and for doing it in an imprudent or unskillful manner, or for not removing the stone in due time, the party is entitled to his remedy in the proper form: *Sabin v. Vermont Central R. R. Co.*, 25 Vt. 363; compare *St. Peter v. Denison*, 58 N. Y. 416; 17 Am. Rep. 258; *Hay v. Cohoes Co.*, 2 N. Y. 159; 51 Am. Dec. 279; *Carman v. Indiana R. R. Co.*, 4 Ohio St. 399; *Matter of Thompson*, 43 Hun, 416.

Obstructing Flow of Water. — In all ordinary cases, a railroad company, in building its road, acquires no right to obstruct a natural watercourse; and it must construct a culvert or drain, with a proper grade, to carry off the water: *Johnson v. Atlantic etc. R. R. Co.*, 35 N. H. 569; 69 Am. Dec. 560; *Raleigh etc. R. R. Co. v. Wicker*, 74 N. C. 220. So, according to many decisions, possible future injuries from accumulated surface water, caused by the erection of the road-bed and track, constitute no part of the incidental loss and damage estimated in fixing compensation for granting the right of way. It is held to be the duty of the railroad company to provide, by sufficient culverts or other means, for the safe passage of such accumulated surface water; and the company is liable in damages for injuries to adjacent lands by overflow or backwater, caused by its failure or neglect to perform this duty: *Corrigger v. Railroad Co.*, 75 Tenn. 388; *Louisville etc. R. R. Co. v. Hodge*, 6 Bush, 141; *Mississippi Central R. R. Co. v. Mason*, 51 Miss. 234. It is held, in accordance with the doctrine of the principal case, that if a railroad company constructs culverts insufficient to carry off the water, which overflows adjoining lands, the company is liable to the owner of the lands for the amount of the damages actually sustained: *Mississippi Central R. R. Co. v. Caruth*, 51 Id. 77. And see, further, as to the liability of a railroad company for any injury resulting to the owner of lands from an obstruction created by the company to the natural flow of surface water, *Owens v. Railroad Co.*, 67 Tex. 679; *Payne v. Railroad Co.*, 38 La. Ann. 164; *Kankakee etc.*

R. R. Co. v. Horan, 22 Ill. App. 145; *Bentonville etc. R. R. Co. v. Baker*, 45 Ark. 252; *Drake v. Chicago etc. R. R. Co.*, 63 Iowa, 302. But the doctrine is maintained in other decisions that, in the absence of negligence, unskillfulness, and mismanagement in the construction of an embankment for its road-bed over land through which there is no natural channel for the passage of water, a railroad company, having lawful authority to construct such road-bed, is not liable for the injury done by the embankment in causing water to overflow land of an adjoining proprietor: *Abbot v. Railroad Co.*, 83 Mo. 271; *Jones v. Railroad Co.*, 84 Id. 151; *Morrison v. Bucksport R. R. Co.*, 67 Me. 353; *O'Connor v. Railroad Co.*, 52 Wis. 526; 38 Am. Rep. 753; *Casidy v. Old Colony R. R. Co.*, 141 Mass. 174; *Cairo etc. R. R. Co. v. Stevens*, 73 Ind. 278; 38 Am. Rep. 139.

Recovery in One Action or in Successive Actions. — The rule adopted in some of the cases is, that damages, present and prospective, resulting from the construction of a railroad or other public work, must all be recovered in one action: *Chicago etc. R. R. Co. v. Loeb*, 118 Ill. 203; 59 Am. Rep. 341; *Chicago etc. R. R. Co. v. McAuley*, 121 Ill. 160. But the principal case limits this rule to the case of a railroad built under authority of law, and in a reasonably proper and skillful manner, so as to avoid the infliction of all loss and injury not necessarily resulting from thus building and operating the road. And where a railroad was unlawfully constructed in a city street, in an action by an abutting owner to recover damages, it was held that damages could be recovered only up to the commencement of the action, the plaintiff's remedy being by successive actions for his damages until the abatement of the nuisance: *Uline v. N. Y. Cent. etc. R. R. Co.*, 101 N. Y. 98; 53 Am. Rep. 123; 59 Id. 358; and see *Lahe v. Metrop. El. R. R. Co.*, 104 N. Y. 268; *Silsby Mfg. Co. v. State*, 104 Id. 562; *Barrick v. Schifferdecker*, 48 Hun, 355; *Ford v. Railroad Co.*, 59 Cal. 290. It is, however, held in other cases that where injury to real estate is caused by the negligence of corporate officers in constructing a public work of a permanent character, as the grading of a street, all damages, past and prospective, can be recovered in one action, and for fresh damages resulting from the original wrong a second action cannot be maintained: *City of North Vernon v. Voegler*, 103 Ind. 314; *City of Lafayette v. Nagle*, 113 Id. 425. In other words, where a nuisance is of a permanent nature, all the damages caused thereby are deemed to accrue at once upon its becoming such, and a party injured thereby can maintain only one action therefor, covering all damages, past and prospective, and that against the party doing the injury, and not against his grantee: *Bizer v. Ottumwa Hydraulic Power Co.*, 70 Iowa, 145; *Powers v. Council Bluffs*, 45 Id. 652; 24 Am. Rep. 792; *Peden v. Chicago etc. R. R. Co.*, 73 Iowa, 328; and as the damages accrue at once in favor of the owner of the premises, they cannot be recovered by his successor in interest who suffers thereby: Id.; and see *Chicago etc. R. R. Co. v. Maher*, 91 Ill. 312. In a leading case on the subject, the rule is thus stated: "Wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change from any cause but human labor, there the damage is an original damage, and may be at once fully compensated, since the injured person has no means to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means. But where the continuance of such act is not necessarily injurious, and where it is necessarily of a permanent character, but may or may not be injurious, or may or may not be continued, there the injury to be compensated in a

suit is only the damage that has happened": *Troy v. Cheshire R. R. Co.*, 23 N. H. 83; 55 Am. Dec. 177. This rule is sustained in *Fowle v. New Haven etc. Co.*, 107 Mass. 355, 112 Id. 339, holding that where the injury done by a railroad to a highway is of a permanent character, the plaintiff may recover in one action the entire damages, and they are not limited to those actually suffered at the date of the writ, and the judgment in such a case is a bar to a like action between the parties for subsequent injuries from the same cause: And see, in support of this view, *Chicago etc. R. R. Co. v. Maher*, 91 Ill. 312; *Elizabethtown etc. R. R. Co. v. Combs*, 10 Bush, 382; *Jeffersonville etc. R. R. Co. v. Esterle*, 13 Id. 667; *Beckett v. Midland R'y Co.*, L. R. 3 Com. P. 82. But where the extent of the wrong may be apportioned from time to time, separate actions should be brought to recover the damages sustained: *Smith v. Railroad Co.*, 23 W. Va. 453; *Hargreaves v. Kimberley*, 26 Id. 787; 53 Am. Rep. 121; and see *Cumberland etc. Co. v. Hitchings*, 65 Me. 140; *Nat. Copper Co. v. Minnesota Min. Co.*, 57 Mich. 83; 58 Am. Rep. 333; *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583; *Lord v. Carbon Iron Mfg. Co.*, 42 N. J. Eq. 157; *Kansas Pacific R'y Co. v. Muhlman*, 17 Kan. 224. Whether the injury is permanent, as where a railroad company constructs an insufficient culvert in its road-bed, is a question for the jury: *Peden v. Chicago etc. R. R. Co.*, 73 Iowa, 328; and see *Union Trust Co. v. Cuppy*, 26 Kan. 754; *Cooper v. Randall*, 59 Ill. 317; *Little Rock etc. R. R. Co. v. Chapman*, 39 Ark. 463; *Silsby Mfg. Co. v. State*, 104 N. Y. 562, 569.

RAILROAD COMPANY IS LIABLE FOR DAMAGES TO PLAINTIFF'S LAND BY FLOODING, where it resulted from insufficiency of culvert in embankment upon its road: See *Pittsburg R. R. Co. v. Gilleland*, 94 Am. Dec. 98.

ALKIRE v. KAHLE.

[123 ILLINOIS, 496.]

CONVEYANCE OF LAND TO PERSONS WHO ARE AT THE TIME PARTNERS, AND DESCRIBING THEM IN THE DEED AS COMPOSING THE FIRM of A & Co., does not make the land partnership property, nor afford any indication that it was purchased with partnership funds or for partnership purposes.

TO MAKE LAND PARTNERSHIP PROPERTY, it must have been purchased with partnership funds for partnership purposes, or at least there must have been one of such elements present. A court is not justified in finding that real property, which was conveyed to two partners, became partnership property when it does not appear to have been used in the business of the partnership, or to have been paid for out of its funds, although the partners, in testifying about such property, designate it as partnership assets.

Happy and Travous, for the appellants.

Metcalf and Metcalf, and Wise and Davis, for the appellees.

SHELDON, C. J. This was a bill in equity, brought by Christian Kahle, against Alkire & Co. and Charles N. Travous, to set aside a sheriff's sale and certificate of purchase of a cer-

tain tract of land made to Travous, on an execution upon a judgment in favor of Alkire & Co., against one Henry Robinson.

The original bill set forth that on August 26, 1884, Cato Abbott and Henry Robinson were each seised in fee-simple of an undivided one half of the land; that on that day Robinson conveyed his one half to Abbott, the deed whereof was recorded May 26, 1886; that upon the execution of the deed from Robinson, Abbott entered into and continued in the possession of the premises until the sale thereof to complainant; that on April 24, 1886, complainant purchased the same from Abbott for the consideration of eighteen hundred dollars, and received a warranty deed therefor; that at the October term of court, 1884, Alkire & Co. recovered a judgment against said Robinson, under which, on execution, the sheriff's sale in question, of Robinson's interest in the land, was made to Travous on August 24, 1885. At a late stage of the cause, after answers, replication, and reference to the master to take testimony, the bill was amended by alleging further that the land in question was partnership property, of the firm of Abbott and Robinson; that there had been a dissolution of the firm; that it was insolvent and unable to pay its debts, and that Abbott had advanced, for the firm, moneys, by paying debts of the firm of a greater amount than the value of the land, claiming a superior equitable lien upon the premises on that account, and that since filing the original bill a sheriff's deed had been made to Travous, and asking that it should be set aside. The court below, upon hearing, on proofs taken, decreed in favor of the complainant, and the defendants appealed.

The ground of the complainant's claim for relief, by the original bill, is, that Robinson had no interest in the land at the time the judgment against him was obtained and the sale under execution thereon made; that he had previously conveyed away his interest to Abbott, and under the amended bill, that if Robinson had any interest in the land at the time of the judgment, it was subject to a valid lien, in equity, which Abbott had upon it as partnership property for what was due to him as partner in the firm of Abbott and Robinson.

The judgment against Robinson was at the October term, 1884. To show that at that time Robinson had no interest in the land, complainant introduced in evidence a quitclaim

deed from Robinson to Abbott, of Robinson's interest in the land, purporting to bear date February 26, 1884, and Robinson and Abbott testified, generally, that the deed was executed at the time it bears date, and the officer who took the acknowledgment testified that it was taken before him at the time it bears date, which was February 26, 1884. In opposition to this, the defendants introduced four witnesses, three of them being entirely disinterested, who testified that in the date of the year appearing in the body of the deed, and in the certificate of acknowledgment (1884), there had been an erasure of the last figure in the number of the year, and the figure "4" written over it, making it read 1884; that in the certificate of acknowledgment the erasure was complete, there being no trace of the figure erased left, but that in the body of the deed the erasure had been so imperfectly made that by an examination under a glass the figure "6" was plainly to be seen under the figure "4." There was no rebuttal whatever of this testimony, but it stood entirely uncontradicted, with no attempt at explanation of the erasure and alteration of date. All that appeared as in any way opposed thereto was the general statement before referred to, made by witnesses on introduction of the deed by the complainant, that the deed was executed at the time it bears date. But Robinson, one of the witnesses who had so testified in chief, on cross-examination said: "All I can tell about the execution and delivery is from the date of the deed. Have no recollection aside from that. When I testified this deed was executed on the 26th of February, 1884, it was because the deed bears date that day." The same may have been the case with the two other witnesses who testified the deed was executed at the time it bears date. It appears that the writing in the body of the deed and in the certificate of acknowledgment was made by different persons,—Robinson and the officer taking the acknowledgment. It would be extraordinary that they both should make the same identical mistake in the date of the year.

There is corroborative evidence of the alteration of the date of the deed. Abbott and Robinson executed a written lease of the land, dated August 23, 1883, for one year from March 1, 1884. The tenant occupied the land for three years, from March 1, 1884, he testifying that he knew of no change in the ownership of Abbott and Robinson. The rent for the first two years he paid to Abbott, the latter signing all the rent receipts in the name of Abbott and Robinson.

On April 3, 1885, Abbott procured an abstract of title of the land to be made, for the purpose of borrowing money on his interest. The abstracter testifies that at that time Abbott objected to the abstract, showing the judgment against Robinson, as it had nothing to do with his half, and that Abbott then told him Robinson had promised at one time to deed him his half, because he had paid some debts for him, but that Robinson had never done so. Abbott says he does not remember so telling the abstracter.

The banker to whom Abbott applied for the loan in the spring of 1885 testifies that he was satisfied with the security on Abbott's half-interest in the land, but as the abstract presented showed the title to be in Abbott and Robinson, he was apprehensive there might be a partition suit, to which he did not wish to be a party, and for that reason he refused to make the loan to Abbott. He says that Abbott did not then claim to own more than one half of the land. The person who accompanied Abbott at the time, to assist him in obtaining the loan, testifies to the same effect. Mr. Happy, to whom this money expected to be borrowed was to be paid, to satisfy a judgment against Abbott, testifies that Abbott told him of the refusal of the loan,—that he said he only had an undivided interest in the land he had offered as security, and that the banker had refused to loan him the money on an undivided interest, and he would have to make other arrangements. This witness was interested as a purchaser from Travous of one half of his interest in the land. The defendant Travous testifies that some two or three days before the sale under the execution, in a conversation he had with Abbott, the latter told him that Robinson had promised to deed his half of the land to him (Abbott), but never had done so, and now it was going to be sold away from them,—to all which Abbott says he does not recollect the occurrences.

We are satisfied from the evidence that the deed from Robinson to Abbott was not made on the twenty-sixth day of February, 1884, as it so purports, but that it was made subsequent to the recovery of the judgment of Alkire & Co. against Robinson, and so subject to the lien of that judgment, unless the claim, under the amended bill, of a paramount equitable lien of Abbott upon the land, as partnership property, can be sustained. Respecting such claim, it appears that the firm of Abbott and Robinson, consisting of Cato Abbott and Henry Robinson, was formed in 1857, to do a general merchandise

business at Venice, in Madison County, Illinois, the partnership continuing until December 5, 1881, when it was dissolved by Cato Abbott selling out to two other individuals his interest in the stock of merchandise then in the store. The partnership name of the new firm was Henry Robinson & Co. A warranty deed of the land in question was made September 24, 1872, conveying the same to "Cato Abbott and Henry Robinson, composing the firm of Abbott and Robinson, of the county of Madison and state of Illinois."

We recognize it as a principle of the law of partnership that the separate estate or interest of a copartner in any of the copartnership property is only his share of that part of the copartnership effects which remains after the debts of the firm, and the demands of his copartners as such, are satisfied; and if one of the copartners has paid more than his share of the partnership debts, he has a claim upon the partnership property, which claim, in equity, is paramount to the claims of the separate creditors of his copartners, and that real estate of a copartnership is, in equity, to be treated as part of the effects of the firm.

The fact of the conveyance being to the members of the partnership did not make the land copartnership property, nor did the mention in the deed of the grantees as "composing the firm of Abbott and Robinson" do so: *Sigourney v. Munn*, 7 Conn. 334. That was but *descriptio personæ* of the individual grantees in the deed. Such a description of the grantees, as said in the case last cited, affords no indication that the land was purchased with partnership funds, or appropriated to partnership purposes. To have made this land partnership property, it must have been purchased with partnership funds for partnership purposes, or at least there must have been one of such elements present: Parsons on Partnership, 364, 365; Collyer on Partnership, sec. 135, and cases cited in note; *Horie v. Carr*, 1 Sum. 183; *Buchan v. Sumner*, 2 Barb. Ch. 165; 47 Am. Dec. 305; *Wheatley's Heirs v. Calhoun*, 12 Leigh, 264; *Alexander v. Kimbro*, 49 Miss. 529. The business of this copartnership was that of merchandising in a small village. The land in question was farm land, situated several miles distant, and does not appear to have had any connection in any way with the business of the partnership. The evidence shows the land was sometimes rented, and a part of the time Abbott and Robinson farmed it themselves, sowing it generally in wheat. There is in the record no evidence whatever that the land was

purchased for partnership purposes, or that it was appropriated to any purpose of the partnership; and, as we think, there is an equal absence of evidence that the land was purchased with partnership funds. All that there appears in this respect, aside from the description in the deed above adverted to, is, that Abbott and Robinson, in giving their testimony herein, some five years after the dissolution of the partnership, in enumerating the assets of their merchandising business, class this land among the assets of the firm. There is not an intimation in their testimony that the land was bought with partnership funds or for partnership purposes, or that it was ever put to partnership use, and no other witness speaks upon the subject. Such calling of land assets of a partnership, as above mentioned, does not make it such, and we do not regard it as evidence which should impress the land with the character of partnership property. In order for that, there should be some evidence of the elements which go to constitute the land partnership property,—some evidence of facts going to show it to be partnership property.

We find from the evidence that the land in question was real estate, held by the two copartners, Abbott and Robinson, as tenants in common, and not as a part of the partnership property, and consequently that there is no foundation for the equitable claim, which is set up, of Abbott upon the land as partnership property.

The decree will be reversed, and the cause remanded, with direction to dismiss the bill.

WHETHER LAND PURCHASED WITH PARTNERSHIP FUNDS BECOMES PARTNERSHIP PROPERTY is fully discussed in the note to *McCormick's Appeal*, 98 Am. Dec. 197-201.

BUTTENUTH v. ST. LOUIS BRIDGE COMPANY.

[123 ILLINOIS, 535.]

EQUITY WILL NOT RELIEVE AGAINST AN ASSESSMENT OF PROPERTY FOR THE PURPOSES OF TAXATION, on the ground that such assessment is too high, when the excess, if any exists, resulted from an honest error of judgment on the part of the assessor. In such cases the party aggrieved must resort to the remedy provided by statute. If he omits to do so at the proper time and place, his remedy is lost.

EQUITY WILL RELIEVE AGAINST AN ASSESSMENT FRAUDULENT IN FACT OR IN LAW.

RIVER AS A BOUNDARY BETWEEN STATES.—If a river is declared by statute or other law to be the boundary between states, the river, “as
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it runs, continues to be the boundary," although it may change imperceptibly from natural causes. But if the river suddenly changes its course or deserts its natural channel, the boundary remains where it was before, in the middle of the deserted river-bed.

WHERE A RIVER IS A BOUNDARY BETWEEN STATES, IT IS THE MAIN OR PERMANENT RIVER which constitutes the boundary, and not that part which flows in seasons of high water and is dry at other times.

PHRASES "MIDDLE OF THE RIVER" AND "MIDDLE OF THE MAIN CHANNEL," when employed to designate the boundary between states, both signify the mean center line of the main channel, — or, as it is more frequently expressed, the "thread of the stream."

THE "CHANNEL" IS THE BED OF A STREAM OF WATER, especially the deeper part of a river or bay where the main current flows. When employed in treating of subjects connected with the navigation of rivers, it indicates the line of deep water which vessels follow, — the space within which vessels may and usually do pass.

THE BOUNDARY BETWEEN THE STATES OF ILLINOIS AND MISSOURI is the thread of the main stream of the Mississippi River.

WHERE A NAVIGABLE RIVER FORMS THE BOUNDARY LINE BETWEEN STATES, BOTH ARE PRESUMED TO HAVE THE FREE USE OF IT, AND THE DIVIDING LINE WILL RUN IN THE MIDDLE OF THE CHANNEL, unless the contrary is shown by long occupancy or agreement of parties. Each state holds to the center thread of the main channel or current along which vessels in the carrying trade pass, — that is, to the channel of commerce, not the shallow water of the stream, which, at some seasons of the year, may be impossible of navigation.

IN ASSESSING FOR PURPOSES OF TAXATION A BRIDGE WHICH EXTENDS ACROSS A RIVER CONSTITUTING THE BOUNDARY BETWEEN TWO STATES, each state may assess and tax so much of such bridge as does not stand beyond the "thread," or "middle of the main channel," of such river.

R. D. W. Holder, Robert A. Halbert, and L. D. Turner, for the appellants.

G. and G. A. Koerner, for the appellee.

SCOTT, J. It is alleged complainant, the St. Louis Bridge Company, is the legal successor of the Illinois and St. Louis Bridge Company, which was incorporated in 1868, and which constructed a bridge over the Mississippi River, from East St. Louis to St. Louis. The work was completed on the fourth day of July, 1874, and from that time on the bridge was operated by the original corporation until September 20, 1878, when it was sold under a decree of court, and passed to complainant, and has since been operated and controlled by it. Only two persons are named as defendants, — one is William Buttenuth, the assessor for the year 1885 for the town in which the property is situated, and the other is Philip Rhein, who was then county clerk of the county in which the property is situated. Two principal grounds of relief are relied

upon: 1. That complainant's property was assessed so high in proportion to other property in the town that it was a fraud on its rights, and was oppressive; and 2. That a portion of the bridge that was in fact within the state of Missouri was assessed to complainant by the local assessor as property situated in this state. The bill contains other matters of complaint of a less serious nature, some of which may be noticed farther on. The specific prayer of the bill is, the assessment may be set aside, and that defendant Rhein, the county clerk, be enjoined and restrained from extending any taxes on the assessment made on complainant's property. Although the answers of defendants are not under oath, they make the distinct issue, complainant's remedy for alleged grievances, if any existed, was at law, and not in chancery. It is alleged the town board was in session on the fourth Monday of June, 1885, and that although the assessment was completed before that time, no one appeared on behalf of complainant to complain its property was assessed too high, or otherwise wrongfully assessed. It is also alleged complainant did appear before the county board, and claimed that its property was assessed too high. The complaint was not considered, perhaps for the reason it was not made to appear the assessment was made after the fourth Monday of June, 1885. On the final hearing, the court found the assessment complained of was so grossly disproportionate to the valuation of other property in the township, and so excessive, as to amount to a fraud on complainant; and the court further found that part of the bridge structure—that is to say, all of that part that lies west of the easternmost pier of the bridge—is outside of the limits of the state of Illinois, and was illegally assessed and included in the assessment with that part of the bridge which is within the limits of the state of Illinois. It was therefore ordered and decreed by the court that the assessment of complainant's property, so made by defendant Buttenuth, be set aside and declared null and void, and that the temporary injunction previously granted, enjoining the defendant Rhein “from extending the said taxes against said property, and from certifying the said taxes to be collected, to the collector of the township, or issuing his warrant for the said taxes to be collected upon said assessment, be made perpetual, and that the said defendant, Buttenuth, pay the costs of said suit.”

It is so obvious the proposition needs no discussion,—where the excessive valuation complained of is the result of a mere

honest error in judgment on the part of the assessor making the assessment, chancery has no jurisdiction to afford the party aggrieved any relief. This court has expressly decided, in *English v. People*, 96 Ill. 566, the statute affords the party aggrieved the only remedy for the correction of an excessive valuation of his property for the purposes of taxation, unless it is fraudulently assessed too high. When the assessment is completed before that time, the application must be made to the town board, under the provisions of the eighty-sixth section of the revenue law (Rev. Stats. 1874), on the fourth Monday of June. In this case, it appears the town board was in session on the fourth Monday of June, in the year complainant's property was assessed, but no complaint was made to it on behalf of complainant that its property was assessed too high, or otherwise illegally assessed.

It is said complainant was misled by the answer of the assessor, in response to an inquiry concerning the assessment made, about the time the town board would meet, that he had not completed the assessment, and for that reason no application was made to the town board. Conceding that to be so, then the application for relief should have been made to the county board, under section 97 of the revenue law. Application was made to the county board under the latter section of the statute. Counsel for the bridge company was heard before the county board, and the matter was referred to an appropriate committee. That committee reported: "It is claimed by the attorneys of said bridge company that the Illinois side of said bridge was assessed after the fourth Monday of June, but no further evidence having been produced, your committee does not recommend any action in the matter." It seems counsel for the bridge company was again heard in regard to the assessment of its property for the year 1885, but the report was adopted. Conceding, as it is thought must be done, there was no satisfactory evidence the assessment was made after the fourth Monday of June, the county board very properly refused to take jurisdiction of the matter. There should have been explicit proof the assessment was made after the fourth Monday of June, and it seems the assessor himself would be the proper party by whom to prove that jurisdictional fact. Proof of his statement as to that fact, made in a casual conversation, when he was not engaged in any official act in relation to such assessment, is not competent evidence to prove when the assessment was in fact made

or completed, and did not excuse complainant from making application to the town board when in session, as it was at the time designated in the statute. Omitting to make application then to the town board at its regular session, at the appointed time, complainant lost all remedy under the statute for relief against the alleged excessive valuation of its property for taxation.

But it is alleged in the bill the assessment was fraudulent, and it is upon that ground it is suggested the jurisdiction of a court of chancery rests to afford the relief demanded. Should it be made to appear the assessment was fraudulent in fact or in law, no doubt a court of equity would set it aside, on the principle fraud vitiates everything it touches, and equity will permit nothing to stand that is tainted with fraud, either in private or public transactions. But is it shown the assessment is fraudulent, either in fact or in law? It is thought it is not. No misconduct is imputed to the assessor in connection with the assessment, except that he promised to visit the office of the company before making it, to hear the suggestions of the company's officers as to facts that would materially affect the amount of the assessment, but it is alleged he failed to keep his promise in that regard. The assessor was under no legal obligation to call upon the officers of the company for information in regard to his duty in making the assessment of its property, nor is it insisted he was. The office of the company was located in St. Louis, out of this state, and it would seem if its officers had any facts to communicate to the assessor that would be at all likely to affect the assessment favorably for the company, it was their privilege to go to his office, and there lay them before him for his consideration. Because the assessor did not call at the company's office affords no just grounds for complaint, and the charge he omitted to do so does not aid, in the slightest degree, complainant's demand for equitable relief.

The court found by its decree the assessment complained of was so grossly disproportionate to the assessment of other property in the town, and was so excessive in amount, as to be a fraud upon complainant. Is this finding of the court sustained by the evidence submitted at the hearing? It can hardly be said it is. On this branch of the case, the evidence is very unsatisfactory. There are witnesses who state, in a general way, it is their opinion the bridge property is assessed proportionately much higher than other property in the town;

but upon what facts their judgments in that respect are based does not appear with any distinctness. As compared with the valuation placed by the assessor upon all other property within the town, it was their judgment the valuation of the bridge property was much too high. It should not be forgotten the local assessor does not assess railroad property, of which there is a very large amount in that town, and when the value of all railroad property is added to that fixed by the assessor on other property, no witness ventures to state the valuation of the bridge property would be disproportionate to the aggregate valuation of the entire property of the town. It is shown the valuation placed on the property of complainant is less than the average valuation since 1875, including that year. In some years it was much higher, and in others less. In 1875 the assessed value was one million nine hundred thousand dollars, and in 1876 it was the same, while in 1885, of which complaint is made, the assessed value was one million one hundred thousand dollars. On the whole evidence considered, it does not appear the valuation placed upon complainant's property is so much higher in proportion to that placed on other property in the town it is fraudulent for that reason. Nor does it appear, from anything contained in this record, that assessment is excessive in itself. There is no evidence of the value of that part of the bridge and its approaches subject to taxation in this state, and without evidence of its value, it cannot be declared, as a matter of fact, the present valuation is excessive to that degree it is fraudulent in law.

The remaining ground of relief insisted upon is, that part of the bridge structure which lies west of its easternmost pier is outside of the state of Illinois, and was illegally assessed and included in the assessment with that part which is confessedly within the limits of the state. On this branch of the case some evidence was offered, and some discussion has been had as to the boundary line between the states of Missouri and Illinois at the point where the bridge structure spans the Mississippi River. That question is certainly one of great gravity, and one this court will hardly undertake to determine definitely on the meager evidence to be found in this record, and in a case where neither state is represented, and where there are no defendants other than private citizens, neither of whom had the slightest personal interest in the matter. The utmost this court will assume to decide is, what part of complainant's bridge is to be regarded as within the state of Illi-

nois for the purposes of taxation? or, what is the same thing, does the valuation of complainant's property, as made by the assessor for 1885, include any portion of the bridge not subject to taxation in this state?

It is certain no part of that portion of the bridge structure assessed by the local assessor for taxation in this state is in the state of Missouri, nor does it appear that it was ever subject to taxation in that state. In the act of Congress, March 6, 1820 (U. S. Stats. at Large, 545), to enable the territory of Missouri to form a constitution, in fixing the boundaries, it is declared, "thence due east to the middle of the main channel of the Mississippi River; thence down and following the course of the Mississippi River, in the middle of the main channel thereof." The state of Missouri, by its constitution of 1820, ratified the boundaries as fixed by the enabling act of Congress, and we are not aware the eastern boundary of the state has since been changed. The constitution of 1875 of that state simply ratified and confirmed the boundaries of the state as established by law. Notwithstanding the fact the main channel of the river might be changed by imperceptible natural wear on one side, or by gradual formation of alluvions, still "the middle of the main channel," when ascertained, would be the boundary of the state. It might be a slightly shifting line, hardly perceptible; still it would be a well-known and easily ascertainable boundary line. The rule of law is, when a stream dividing coterminous states, being a boundary line, alters its channel by a gradual or imperceptible process of wear or of alluvions, the boundary shifts with the channel. No matter what conclusion might be reached as to the western boundary of Illinois, it cannot be maintained the eastern boundary of the state of Missouri is farther east than the "middle of the main channel" of the Mississippi at the point where the bridge structure spans that river. It is not alleged in the bill, nor claimed in argument, any portion of the bridge assessed by the local assessor in this state lies west of the "middle of the main channel" of the river. It would seem to follow, therefore, if that portion of the bridge included in the assessment that lies between the eastern pier of the bridge and the "middle of the main channel" of the river is not within the limits of the state of Illinois, it is not included within the defined boundaries of any state. That conclusion will hardly be adopted, unless the question will admit of no other solution.

The act of Congress of April 18, 1818, to enable the people of the territory of Illinois to form a state constitution, fixed the western boundary at the "middle of the Mississippi River," and declared the state should have concurrent "jurisdiction on the Mississippi River with any state or states to be formed west thereof, so far as said river shall form a common boundary to both." By the constitution of 1818, the people ratified the boundaries fixed for the state by the enabling act of Congress, and in the constitutions of 1848 and of 1870 the same boundaries and jurisdiction are declared, except in the two last constitutions it is provided, "this state shall exercise such jurisdiction upon the Ohio River as she is now entitled to, or such as may be agreed upon by this state and the state of Kentucky." It seems clear, from all legislation and ordinances on this subject, it was intended the Mississippi River should constitute "a common boundary" between the state of Illinois and any state or states that might be formed to the west and next to that river. That intention is more definitely declared than it was in regard to the Ohio River, for in fixing the boundary of Illinois, when the line down along the middle of the Mississippi River should reach the confluence of that river with the Ohio, the boundary should be from thence up the latter river "along its northwestern shore," and yet it has been held the river is the boundary between states divided by the Ohio River, although the original proprietor, in granting the territory, retained the river within its own domain. The law, as stated by law-writers, and in the adjudged cases, seems to be, that where a river is declared to be the boundary between states, although it may change imperceptibly, from natural causes, the river, "as it runs, continues to be the boundary." But if the river should suddenly change its course, or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river-bed. Where a river is a boundary between states, as is the Mississippi between Illinois and Missouri, it is the main—the permanent—river which constitutes the boundary, and not that part which flows in seasons of high water, and is dry at other times: *Handley's Lessee v. Anthony*, 5 Wheat. 374. In no other way would a river be a permanent fixed boundary, at all times readily ascertainable. There are many cogent reasons why the boundary lines between states should be permanent; otherwise territory in one state at one time sooner or later might be

in another state. It must be in one state all the time, or else the state would lose jurisdiction over it.

Treating, then, as must be done, the Mississippi River as a common boundary between the states of Illinois and Missouri, what meaning is to be given to the term, "middle of the Mississippi River," used in the enabling act of Congress, and in the constitution, defining the boundaries of the state of Illinois? Whether, when mere private rights are involved, the phrases, the "middle of the river," and the "middle of the main channel," or, what is the same thing, the "thread of the stream," mean the same thing, and may be interchangeably used, there are many considerations affecting the public welfare why it should be held the "middle of the channel" of a river between independent states or countries should be regarded as the boundary line between them, in the absence of express agreement to the contrary. When applied to rivers as boundaries between states, the phrases, "middle of the river," and "middle of the main channel," are equivalent expressions, and both mean the center line of the main channel,—or, as it is most frequently expressed, the "thread of the stream." Should the expression, "middle of the river," be construed to mean a line midway of the water surface, that would give no permanent boundary that could be ascertained. It would be at one point at one time, and distant away at another. Had the boundaries of Illinois been fixed at the time of the high water in 1844, and the middle of the river opposite St. Louis been held to be a line midway of the surface of the water, that line would then have been far east of the present city of East St. Louis, and on the waters receding, it would have shifted back towards the west, nearer the city of St. Louis. So unsatisfactory a proposition as that will not be adopted. It would lead to insurmountable difficulties. Some light will be cast upon the subject of inquiry by first ascertaining, as near as may be, the meaning of the words, "main channel," "mid-channel," "middle of the current," as those terms are used in the adjudged cases and in the text-books that shall be examined.

The definition of the word "channel," given in the most recent edition of Webster's Dictionary, is, "the bed of a stream of water; especially the deeper part of a river or bay where the main current flows." The case of *Dunlieth and Dubuque Bridge Co. v. County of Dubuque*, 55 Iowa, 558, while this court does not approve the decision of the case, contains a

very accurate definition of the word "channel," as commonly used by river-men. It is, "the word 'channel,' when employed in treating subjects connected with the navigation of rivers, indicates the line of the deep water which vessels follow." In *Rowe v. Smith*, 51 Conn. 266, 50 Am. Rep. 16, it is said: "The expression, 'middle of the channel of the bay or harbor,' does not refer to the thread of deepest water, but to that space within which ships can and usually do pass." It is apprehended it is in this sense the expressions, "middle of the river," "middle of the main channel," "mid-channel," "middle thread of the channel," are used in enabling acts of Congress and in state constitutions establishing state boundaries. It is the free navigation of the river—when such river constitutes a common boundary (that part on which boats can and do pass, sometimes called "nature's pathway")—that states demand shall be secured to them. When a river, navigable in fact, is taken or agreed upon as the boundary between two nations or states, the utility of the main channel, or, what is the same thing, the navigable part of the river, is too great to admit a supposition that either state intended to surrender to the state or nation occupying the opposite shore the whole of the principal channel or highway for vessels, and thus debar its own vessels the right of passing to and fro for purposes of defense or commerce. That would be to surrender all, or at least the most valuable part, of such river boundary for the purposes of commerce, or other purposes deemed of great value to independent states or nations.

Construing, then, the phrases, "middle of the Mississippi River," and the "middle of the main channel of the Mississippi River," to mean the same thing, both acts of Congress fixing the boundaries of Illinois and Missouri declare the middle of the main channel of the Mississippi River to be the boundary line between the states, and that is the thread of the main stream.

In *Thomas v. Hatch*, 3 Sum. 170, Story, J., said: "I consider the law to be clearly settled that a boundary on a stream, on or by a stream, or to a stream, includes the flats, at least to low-water mark, and in many cases to the middle thread of the river."

A valuable case on this subject is *Morgan v. Reading*, 3 Smedes & M. 366. The opinion is by Chief Justice Sharkey. Although not directly involved, the discussion, in part, had relation to the boundary line of the state of Mississippi. The

facts as stated in the opinion are, that by various treaties and cessions the United States had succeeded to all the territory east of a line drawn along the middle of the Mississippi, above the thirty-first degree of latitude. Louisiana was then bounded on the east by the same line,—the middle of the river above the river Iberville, as it had been established by the treaty of 1763. In 1798, while the middle of the river was still the boundary line between the province of Louisiana and the United States, Congress established the Mississippi territory, bounding it on the west by the Mississippi. It was in reference to that line the court said: "We have said that Congress omitted to mention the middle of the river, but bounded the territory by the Mississippi." The common law, by construction, extends grants bounded "by" or "on" or "along" a fresh-water stream, to the thread of the stream. The Mississippi territory, by this rule, extended to the middle of the river.

In *Handley's Lessee v. Anthony, supra*, it was said by the court: "Where a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream."

Mr. Field, in his work entitled *Outlines of an International Code*, 2d ed., section 30, in speaking of boundary by stream or channel, says: "The limits of national territory bounded by a river or stream, or by a strait or sound, or arm of the sea, the other shore of which is the territory of another nation, extend outward to a point equidistant from the territory of the nation occupying the opposite shore, or, if there be a stream or a navigable channel, to the thread of the stream,—that is, to the mid-channel,—or, if there be several channels, to the middle of the principal one."

In his work on the law of nations, page 31, Mr. Polson says: "If the river divides two states, the mid-channel is considered as the boundary line, unless prior occupation has given to the one or the other the right of possession to the whole."

There are cases in this and other courts, although the discussion had reference directly to riparian rights, and not to boundaries between states, that illustrate this same doctrine. In *Fletcher v. Thunder Bay Boom Co.*, 51 Mich. 277, it was held the riparian rights of defendant, in the case being considered, extended to the thread of the stream,—to the center of the main channel of the river. It was said by this court in *Middleton v. Pritchard*, 3 Scam. 510, 38 Am. Dec. 112, "that

all grants bounded upon a river not navigable by the common law entitled the grantee to all islands lying between the main-land and the center thread of the current." In *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91, it was said: "It seems to be the settled law of this country that the owner of land bordering upon a river not navigable at common law, such as the Mississippi River, will be entitled to claim to the center of the current of the stream." The same doctrine was restated in *Piper v. Connelly*, 108 Ill. 646, where it is said: "The general doctrine that grants of land bounded upon rivers, or the margins above tide-water, carry the exclusive right and title of the grantee to the center thread of the current, unless the terms of the grant clearly denote the intention to stop at the margin of the river, has been too long established and too firmly adhered to by this court to be now questioned."

No reason is perceived why the principles here stated should not control the decision of the case being considered. As before remarked, it is manifest it was the intention of Congress the Mississippi River should constitute a "common boundary" between the states of Illinois and Missouri, and had the words the "middle of the Mississippi River," and the "middle of the main channel," been omitted in both enabling acts of Congress, still the river itself would be the boundary, and each state would hold to the "middle of the stream,"—that is to say, the middle thread of the stream. The intention in this respect is made most manifest by the fact it must have been and was known to Congress when it passed the enabling act for Missouri, and fixed the boundary at the "middle of the main channel of the Mississippi River," that the western boundary of Illinois had been fixed "at the middle of the Mississippi River," and certainly it was not intended to fix two distinct or different boundary lines. That would have left a space not in either state, and no such absurd intention should be imputed to Congress. It was most appropriately said by the court in *Morgan v. Reading*, *supra*, in respect to the boundary line as fixed by the act of Congress organizing the territory of Mississippi, which established the "Mississippi River" as the western boundary: "All west of that line [that is, the middle of the river] was owned by a foreign power, and we cannot suppose Congress, under the circumstances, designed to limit the jurisdiction of the territory by the bank of the river."

The suggestion, Congress, by its enabling acts, may have

established one line in the Mississippi River for the eastern boundary for Missouri, and another line, farther east, for the western boundary of Illinois, has nothing in law or in fact upon which to rest. The whole legislation on this subject shows, as before remarked, it was the intention of Congress to make the river a "common boundary" between these states, and the expressions used in both enabling acts, although the words used may not be the same, make the middle of the main channel of the permanent river the boundary line. In such cases the principle is, as stated by Mr. Woolsey in his work on international law, section 58: "Where a navigable river forms the boundary between states, both are presumed to have free use of it, and the dividing line will run in the middle of the channel, unless the contrary is shown by long occupancy or agreement of parties." Commercial considerations make it imperative, where states or nations are divided by a navigable river, each should hold to the center thread of the main channel or current along which vessels in the carrying trade pass. That is the "channel of commerce"—not the shallow water of the stream which, at some seasons of the year, may be impossible of navigation—upon which each nation or state demands the right to move its products without any interference from the state or nation occupying the opposite shore. So important has this right ever been deemed, it is thought to be embraced in all treaties, cessions, ordinances, statutes, and constitutions made, enacted, or adopted in regard to the Mississippi River since the federal government was organized. It was the great desire to secure this important privilege that gave rise to all the efforts on the part of the general government to obtain the control of the Mississippi River from its source to that point where it empties into the gulf and connects with the sea.

It has been often ruled, the intention in such great matters as state boundaries, when clearly manifested by cessions, grants, or legislative acts, should control. It is a fact so well known it is not called in question, that so far back as can be known, either from history or tradition, the main channel of the Mississippi River at the point where complainant's bridge is constructed was always west of Bloody Island,—that is, between that island and the Missouri shore. Both states have always recognized this fact, and for that reason Bloody Island, although the river east of it was in fact, at one time, navigable for shallow-draft vessels,—certainly in seasons of

high water,—was always regarded as being within the limits of the state of Illinois. At one time grave apprehensions were entertained that the main channel of the river might change to the east side of Bloody Island, and thus leave the Missouri side; but by the consent of Illinois, expressed by the general assembly, dikes and other structures were erected at the upper end of the island to keep the main channel on the Missouri side, where it had previously been. Those structures proved efficient, and the main channel of the river now flows where it did since before the boundaries of either state divided by it were established by Congress or declared by state constitutions. It is not claimed, either by the bill or in the evidence, that any part of complainant's bridge that was assessed by the local assessor lies west of the middle of what has always been the main channel of the river since the states were organized under the acts of Congress, and this court has no hesitation in coming to the conclusion that all of that part of the bridge, with its approaches, that lies east of the middle line of the main channel of the river, is within the jurisdiction of the state of Illinois for the purposes of state and local taxation. Only that part of the bridge east of the middle of the main channel of the river, as appears from the plat used in making the assessment, was assessed in this case, and that was warranted by law.

The case of *Missouri v. Kentucky*, 11 Wall. 395, cited by counsel for complainant as being conclusive of the case in hand, has been examined, and it is not perceived it contains anything in conflict with the general views here expressed. Indeed, some of the reasoning in that case has been adopted in this opinion.

The judgment of the circuit court will be reversed, and the cause will be remanded, with directions to that court to dismiss the bill.

MIDDLE OF CHANNEL OF BAY OR HARBOR is held not to refer to thread of deepest water, but to that space within which ships can and usually do pass: *Rove v. Smith*, 50 Am. Rep. 16.

INJUNCTION TO RESTRAIN COLLECTION OF TAX OR ASSESSMENT is the subject of the note to *Holland v. Baltimore*, 69 Am. Dec. 198-205.

CHICAGO AND ALTON R. R. Co. v. DILLON.

[123 ILLINOIS, 570.]

OPINION OF WITNESS.—Witness who states that he was at a railroad crossing at the time of an accident, and that he did not hear any bell or whistle, may be asked whether, in his opinion, he would have heard the bell had it been rung, or the whistle had it been blown.

INSTRUCTIONS MUST ALWAYS BE CONSTRUED IN THE LIGHT OF THE ISSUES on trial, and the evidence offered in their support.

NOTICE OF THE APPROACH OF RAILWAY TRAINS SHOULD BE GIVEN by those in charge of them, at all points of known or apprehended danger.

IN ACTION TO RECOVER FOR INJURIES SUSTAINED FROM NEGLIGENCE OF SERVANTS OF RAILROAD IN NOT GIVING WARNING OF THE APPROACH OF A TRAIN to a public crossing, it is not necessary to show that the avenue there crossed was a public highway, within the meaning of the statute requiring bells to be rung or whistles blown when approaching such highways, for, independent of such statute, it is the duty of persons having charge of trains to give notice of their approach at all points of known or reasonably apprehended danger.

PLEADING. — **PROVISIONS OF PUBLIC STATUTE UNDER WHICH PARTY RESTS HIS RIGHT** to recover need not be pleaded, unless the statute gives a cumulative remedy, in which event the pleader should show which remedy he intends to assert.

PLEADING. — **PLEADER WHO REFERS TO A STATUTE WHEN NONE EXISTS,** or when the statute referred to does not entitle him to any relief on the facts stated, may nevertheless recover, if the facts as alleged and established are sufficient to entitle him to recover at common law. In such cases the reference to the statute may be regarded as surplusage.

L. H. Hite, and Brown and Kirby, for the appellant.

W. H. Bennett, and Dill and Schaefer, for the appellee.

MULKEY, J. On the 20th of November, 1882, John M. Dillon, the appellee, in attempting to cross the railway tracks of the National Stock Yards, in or near East St. Louis, at their intersection with Avenue F, received a serious, permanent injury, caused by the vehicle in which he was riding being struck by a passing locomotive engine, owned and operated by the Chicago and Alton Railroad Company. The horse he was driving was killed outright, the wagon shattered to pieces, and Dillon himself was thrown a considerable distance, with such force as to cause a serious rupture, partially disabling him for life, and totally disabling him for several months. In 1883 he commenced an action on the case in the circuit court of St. Clair County against the Chicago and Alton Railroad Company, the appellant herein, to recover damages for the injuries thus received by him, which were laid in the declaration at twenty-five thousand dollars. The record before us

does not appear to contain a transcript of all the proceedings which have occurred in the case from its inception, yet we are able to gather from it that the cause has been tried three times, each trial resulting in a verdict for the plaintiff. In one of them the jury assessed the plaintiff's damages at \$875, in another at \$4,000, and in the last at \$3,500. The case has been heard twice in the appellate court. On the first hearing, the judgment of the court below was reversed, and the cause remanded for further proceedings. On the last hearing, that court affirmed the judgment of the trial court, and the present appeal is from the judgment of affirmance.

The avenue upon which the plaintiff was driving runs in a northwesterly and southeasterly direction, and the railway tracks by which it is intersected at the place of collision run nearly east and west. On the westerly side of the avenue, and immediately south of the tracks, is a large hog-house, having many compartments, the east end of which is bounded by the avenue. This structure is from sixty to one hundred feet in width, and extends westerly, upon the line of the tracks, its full length, about the eighth of a mile. It was so high and closely built that no one in the avenue south of the crossing could see a train or engine coming from the west. The engine which occasioned the injury was coming from that direction, and the plaintiff was approaching the crossing from the southeast, but as his view of it was entirely cut off by the hog-house on his left, he consequently could not judge of the safety in crossing, except by means of hearing. The large amount of business done at the stock-yards, as is shown by the evidence, necessarily led to a great deal of travel, back and forth, over the crossing by those, like the plaintiff, doing business there. In view of the circumstances stated, the duty of the defendant to operate its train at a moderate rate of speed, and to give the usual signals of its approach by ringing the bell or sounding the whistle, or both, became the more imperative. Of this there can be no question. The negligence imputed to the defendant in the declaration, and on account of which a recovery was had below, is the alleged failure of the defendant to do either of these things. It is averred in the declaration that the defendant neither rang the bell nor blew the whistle; also that the train was being run at a high rate of speed. This is denied by the defendant's plea, and the cause was tried on these issues.

If the statements of the witnesses on the part of the plaintiff

be accepted as true, all three of these averments in the declaration were sufficiently proved on the trial. If, on the other hand, the defendant's witnesses are to be believed, the defendant was guilty of no negligence whatever, but that the injury complained of was the result of plaintiff's own imprudence and negligence. Of course these questions are not before us, they having been definitely and finally settled by the appellate court adversely to the appellant. It only remains to consider whether any errors of law have intervened of sufficient gravity to require a reversal of the judgment.

Several of appellee's witnesses were permitted to state, on the trial, against the objections of the defendant, that they were near the crossing at the time of the accident, but did not hear any bell or whistle, and that, in their opinion, if the bell had been rung or the whistle sounded they would have heard it, and this is assigned for error. We perceive no valid objection to the ruling of the court upon this subject. Questions of this character are constantly permitted by the most enlightened trial judges, and we are aware of no authority questioning the propriety of allowing them.

The cases of *Hopkins v. Indianapolis and St. Louis R. R. Co.*, 78 Ill. 32, *Pennsylvania Co. v. Conlan*, 101 Id. 93, and *Chicago and Northwestern R'y Co. v. Moranda*, 108 Id. 576, cited by appellant's counsel as sustaining the contrary view, do not, so far as we are able to discover, even look in that direction. Such questions are permitted as matter of convenience, and to avoid prolixity in the examination. When a witness says he was near enough, and would, in his opinion, have heard or seen a given signal had it been given, he in effect says there was nothing to prevent his seeing or hearing it, as the case might be. The permitting of these questions to be asked obviated the necessity of asking a great many others, to prevent certain unfavorable inferences that might be urged if not asked; such as, whether their hearing was good, and if not, to what extent injured; if good, whether their attention was attracted to anything else at the time; whether there was any noise or confusion which might have caused them not to observe or note the fact that the signal was given, etc. All implications suggested by these and other questions of like character that might be mentioned were negatived by the simple statement that, in the opinions of the witnesses, if the signal had been given they would have heard it. Moreover, the competency of testimony of this kind

is distinctly recognized by this court in *Peoria, Pekin, and Jacksonville R. R. Co. v. Siltman*, 88 Ill. 531.

It is next complained that the court erred in permitting counsel for plaintiff, in his opening statement and concluding argument to the jury, to refer to the number of trials there had been in the case, and how they had resulted, and also to state that the judgment on the first hearing in the appellate court had been reversed upon a mere technicality. What is here complained of, we do not think, even conceding it to be improper,—about which we express no opinion,—is of so serious a character as to justify a reversal of the judgment. Trial courts are given a large discretion in matters of this kind, with which courts of review are loth to interfere unless it becomes necessary to prevent a failure of justice. Such is not the case here.

The court gave to the jury three instructions on behalf of the plaintiff, all of which were excepted to by the defendant. The objection to the first is, that it "is singularly confusing." The greater portion of it is a mere statement of what the statute requires of railroad companies when crossing public highways, and the remaining portion simply tells the jury that if they find, from the evidence, that the place of the accident was at a public highway crossing, then it was the duty of the defendant to ring the bell or sound the whistle, as required by the statute. In other words, the court told the jury what the statute enjoined, and then instructed them that it was the duty of the defendant to obey it, if shown by the evidence to be within its provisions. We perceive nothing in this that the most hypercritical could object to.

Plaintiff's second instruction is also complained of. It tells the jury "that it was the duty of the defendant to use reasonable care and diligence to prevent injury to the plaintiff, and if the jury believe, from the evidence, that the defendant failed to perform such duty, by reason whereof the plaintiff, while exercising reasonable care on his part, received the injury complained of, then the defendant is liable." The substance of the objection to this instruction, as we understand it, is, that it authorized the jury to find the defendant guilty upon proof of any actionable negligence causing the injury, whether charged in the declaration or not. We regard this as a strained, hypercritical view of the subject. Instructions should always be construed in the light of the issues being tried, and the proofs offered in support of them. When thus

construed, we find no objection to the instruction in question.

It is finally urged, with great persistence, that the avenue in question is not, within the meaning of our statute, a public highway, and that, as the action is based exclusively on the statute, the failure to ring a bell or sound the whistle was violative of no duty which it imposes, and hence no cause of action is shown. We do not concur in this view. It is to be observed, in the first place, this is not a statutory action to recover the penalty which the statute prescribes for a failure to give such a signal. If it were, quite a different question would be presented. The present is a common-law action, brought for the failure to perform a duty imposed by law. Under the facts disclosed by the record, we do not think it essential to the maintenance of the action that this duty should necessarily arise under the statute, notwithstanding the pleader may possibly have so regarded it in framing the declaration. Without regard to the statute, it is the duty of those having charge of trains to give notice of their approach at all points of known or reasonably apprehended danger. This is almost universally done by the ringing of a bell or sounding of the whistle, and frequently both. In exceptional cases, where the highest degree of care is deemed advisable, flagging is resorted to. That these duties are enjoined by the common law is not disputed; but the claim is, as already seen, that the action is brought upon the statute, and the plaintiff, therefore, cannot avail himself of his common-law rights, although the averments in the declaration are otherwise broad enough for such purpose. This, as we view it, is an entire misapprehension of the whole matter. As before indicated, the action is not brought on the statute, nor does it purport to be. While there are certain expressions in that part of the declaration which attempts to define the duty of the defendant justifying the inference that the pleader had the statute in his mind, yet there is really nothing in it that can properly be called even a reference to the statute. Ever the expressions referred to as showing the drift of the pleader's thoughts are entirely superfluous and uncalled for, and may therefore be treated as surplusage. As mere matter of composition tending to perspicuity, such averments are admissible and even commendable, if not misleading. The act in question is a public statute, of which the courts will take judicial notice.

In suing at common law, in any case where the provisions of a public statute are applicable, it is, as a general rule, no more necessary to set them forth in the declaration than it is to plead a provision of the common law having a like application to the case, and all concede that is never necessary: 1 Chitty's Pl. 215. The only exception to this general rule now remembered is where the remedy given by the statute is cumulative, and differs from that given by the common law. In that case, if the relief given by the statute is sought, the pleader must manifest that purpose or intent by apt words of reference to the statute. Here the relief given by the common law is alone sought; hence the exception to the general rule just adverted to has no application. Of course a different rule prevails in the case of private statutes. Even if the declaration in this case contained a direct reference to the statute, and it was evident that the pleader expected to rely exclusively upon it, still it would not, in our opinion, present an insuperable obstacle to a recovery on common-law grounds, if the allegations otherwise were sufficiently broad, and the evidence warranted it. In a note to Oliver on Precedents, page 528, where this subject is under discussion, we find the following: "So, also, where the action is sustainable at common law, and the declaration concludes, 'against the statute or statutes,' etc., and the statutes have been misrecited or incorrectly referred to, or there is no statute, in fact, in relation to the subject, those words in the declaration shall be rejected as surplusage, and the action shall be maintained at common law: See Salk. 212; Com. Dig., tit. Action upon Statute, C." The general principle here announced fully answers the contention of appellant.

The judgment will be affirmed.

IT IS DUTY OF RAILROAD TO GIVE WARNING OF APPROACH OF TRAIN at crossing whenever danger is to be reasonably apprehended: *Pennsylvania R. R. Co. v. Barnett*, 98 Am. Dec. 347, and cases cited in note; and see the extended note to *Baltimore etc. R. R. Co. v. Breinig*, 90 Id. 55-67.

PROVISIONS OF PUBLIC STATUTES ARE JUDICIALLY NOTICED: See note to *Lanfear v. Mestier*, 98 Am. Dec. 665 et seq.

WOLF v. BEAIRD.

[123 ILLINOIS, 585.]

MONEY PAID THROUGH A MISTAKE OF FACT, IN RESPECT TO WHICH BOTH PARTIES WERE EQUALLY BOUND TO INQUIRE, may be recovered back.

EXECUTOR WHO PAYS A CLAIM IN FULL UNDER A MISTAKE OF FACT, which mistake was to the effect that the assets of the estate were ample to pay all claims against it, when, in truth, there were claims of which he had then no knowledge, may recover of him to whom payment was thus made the amount paid in excess of the amount to which he is shown to have been entitled on the final settlement of the estate.

EXECUTOR WHO SUES TO RECOVER MONEYS PAID BY HIM BY MISTAKE may describe himself as executor in his complaint, though the legal title to the moneys sued for is in him. The descriptive words may be treated as surplusage.

EXECUTOR MAY SUE IN HIS OWN NAME AND RIGHT ON A CONTRACT MADE WITH HIM, or if the word "executor" is used after his name, it will be regarded as merely descriptive of his person, and as immaterial.

CLAIM FILED BY A AS EXECUTOR OF B AGAINST THE ESTATE OF C, FOR MONEYS PAID TO C THROUGH A MISTAKE OF FACT in supposing that B's estate was solvent, should be allowed, although at the time of filing the claim it may not be certain whether the moneys are due to A, as executor or in his private capacity, or to the creditors of B.

Gibson and Johnson, for the appellant.

Wilson and Hutchinson, for the appellees.

MAGRUDER, J. Edward J. French died testate on March 3, 1880. His will was admitted to probate in the county court of Richland County, and letters testamentary were issued to the appellant, John Wolf, as the executor thereof, on March 8, 1880. The county court allowed two claims against French's estate, one on May 18, 1880, and another on August 17, 1880, in favor of John B. Gharst. During the first year of the administration, Wolf had money enough on hand to pay in full all the claims filed against the estate before the end of that year. He paid Gharst thirty per cent of his two claims on August 17, 1880, and he paid him the balance of such two claims on October 15, 1880. On the latter date Gharst's total claim against the estate was paid in full.

At the time Wolf paid Gharst's claim in full, he and Gharst both believed that French's estate was solvent, and would not only be able to pay all the debts, but would have a surplus for the heirs. Both parties acted in good faith, the executor in paying and the creditor in receiving the full amount of the claim. If the claims hereafter mentioned, which were not known to exist at that time, had not been filed, the surplus would have amounted to eighteen hundred dollars.

Two large claims were allowed against the estate, one, on June 20, 1881, in favor of Robert Allyn, trustee, and another, on June 21, 1881, in favor of Lucy French, which made the estate insolvent as to the payment of claims of the seventh class. By the allowance of these latter claims, the assets were so reduced that the estate was only able to pay 61.72 per cent of the claims of the seventh class, to which the Gharst claim and the Allyn and Lucy French claims all belonged. It thus turned out that Gharst had been overpaid by the amount of the difference between 100 per cent and 61.72 per cent.

Gharst died testate on September 4, 1881, and the appellees are the executors under his will. Wolf, as executor of the estate of E. J. French, deceased, filed a claim against Gharst's estate, in the county court of Richland County, for the excess of the amount so paid to Gharst over the *pro rata* share to which he was properly entitled. On June 20, 1882, this claim of Wolf against Gharst's estate was allowed by the county court, and an appeal was taken to the circuit court, where the case was tried before the circuit judge without a jury, by agreement. The circuit court ordered that the claim be allowed as a seventh-class claim, to be paid in due course of administration, and directed that its order be certified down to the county court for payment. The case was then taken by writ of error to the appellate court, which, at its February term, 1886, reversed the judgment of the circuit court, and remanded the cause.

A second trial was had before the circuit judge without a jury, at the November term, 1886, which resulted in a judgment in favor of appellant against appellees. This judgment has been brought before the appellate court a second time, and has been again reversed. It now comes before us by appeal from the appellate court, and upon certificate that the case involves a question of law of such importance, on account of collateral interests, that it should be passed upon by the supreme court.

Both Wolf and Gharst knew, or were bound to know, that, under the law, Gharst could not lawfully receive his claim in full out of the assets of the French estate, unless those assets were sufficient to pay all claims of the same class with his own. There was a mutual mistake of facts in respect to which both parties were equally bound to inquire. They both believed that the assets were sufficient to pay the claims in full,

and acted upon such belief, but both were mistaken in regard to the fact. "Money paid by one party to another, through a mutual mistake of facts, in respect to which both were equally bound to inquire, may be recovered back": *City Bank v. Bank of Albany*, 1 Hill, 287; *Wheadon v. Olds*, 20 Wend. 174.

"The count for money had and received is also maintainable for the recovery of money paid under a mistake, on the part of the payor, of a material fact": 2 Chitty on Contracts, 11th ed., 928; 1 Chitty's Pleadings, 355; *Bank v. Mitchell*, 88 Ill. 52; *Stempfel v. Thomas*, 89 Id. 147. Wolf was mistaken in a material fact. If he had not been mistaken in the fact, which he supposed to exist, that the assets were sufficient to pay the claims in full,—in other words, if the assets had been sufficient to pay the claims in full,—he would have been liable to pay Gharst the 38.28 per cent, so paid to him by mistake.

The filing of the claim by Wolf against Gharst's estate was in the nature of an equitable action for money had and received, or money paid under a mistake of fact. If Wolf could have brought an action of *assumpsit* against Gharst in the latter's lifetime for the excess of the payment over the proper *pro rata* share, then a claim for such excess was a proper claim to be filed against Gharst's estate, so far as the nature of the demand is concerned.

It was held in *Rogers v. Weaver*, 5 Ohio, 536, that an administrator, who, under the supposition that the estate was solvent, had paid a creditor beyond his distributive share, might, upon final settlement, recover back the difference in an action for money had and received. See also *Walker v. Hill*, 17 Mass. 380.

When this case was tried a second time before the circuit judge, at the November term, 1886, it was proven that appellant had filed his final report, as executor, on July 15, 1886, and had been discharged by the county court. The order of the county court, entered at that date, found that the assets were only adequate to pay 61.72 per cent of the claims of the seventh class; that the estate was insolvent as to those claims; that Wolf had paid 61.72 per cent upon all the claims of the seventh class, and the final report was, by such order, confirmed, and the estate declared to be settled. Hence it appeared affirmatively that appellant had advanced out of his own pocket the 38.28 per cent overpaid to Gharst. Otherwise he could not have settled all the seventh-class claims at 61.72 per cent of their amounts.

It is claimed that appellant could only sue in his individual capacity, and not as executor, for the over-payment to Gharst, and that he could not bring suit until he had advanced money enough out of his own means to make up to the French estate the amount of such over-payment, the amount which was paid to Gharst by mistake having been the money of the estate, and not his own money. Upon these grounds, it is urged that when the claim was first filed in the county court in 1882, the cause of action was not ripe for suit.

When the claim was presented to the county court in June, 1882, Gharst's estate owed the amount which had been over-paid to him in his lifetime. Whether Gharst's estate then owed that amount to appellant as executor, or to appellant as an individual, or to the other creditors of the French estate, matters not, so far as the existence of the indebtedness was concerned. The debt existed to somebody, and the same debt existed all the way through up to the last trial in November, 1886. It could make no practical difference to the Gharst estate who owned the claim against it. As Gharst had received more money than he ought to have had, his estate was liable to refund the amount. This liability remained the same from the beginning to the end, whatever variations there may have been in the ownership of the claim, or in the form of the evidence, by which it could be substantiated.

In adjudicating upon the claim the county court was possessed of an equitable jurisdiction: *Dixon v. Buel*, 21 Ill. 203; *Hurd v. Slaten*, 43 Id. 348. Equity disregards mere matters of form and looks at the substance.

It is said that when the claim was filed against Gharst's estate, the county court had not declared the French estate insolvent, and had not by an order fixed the amount of the dividend or *pro rata* percentage belonging to the creditors. Nevertheless, the amount of such percentage was capable of ascertainment in June, 1882. The proof showed at that time the assets of the French estate, the amount of Gharst's claim, and the amounts of all the other claims, including those filed in June, 1881. From these *data* it was easy to figure the amount of the percentage the creditors were entitled to and the amount of the over-payment to Gharst. The subsequent order made on July 15, 1886, was more certain and definite evidence, but after all it was only evidence of what already existed. When the appeal was taken to the circuit court, the trial in the latter court in November, 1886, was *de novo*, and it was proper to

introduce then, as evidence, the order of July 15, 1886, though the same evidence had not yet come into existence in 1882: *Thorp v. Goewey*, 85 Ill. 611.

It is said that this claim was improperly filed by Wolf as executor of the estate of E. J. French, deceased. The money was paid to Gharst after the death of French. The law created an implied contract on the part of Gharst with Wolf to pay back the excess. An executor or administrator may sue, either in his representative or in his personal character, on contracts made with him after the death of the deceased: *Dicey on Parties to Actions*, 233. Where the indebtedness thus grows out of a contract with the executor, he may sue in his own name, or if the word "executor" or "administrator" is used after his name, it will be regarded as merely descriptive of the person, and as being immaterial: *Laycock v. Oleson*, 60 Ill. 30.

The legal title to the money paid to Gharst was in Wolf: *Neubrecht v. Santmeyer*, 50 Ill. 74; *Walker v. Craig*, 18 Id. 116; *Makepeace v. Moore*, 5 Gilm. 474. The right of action was in Wolf. The statute does not require any written pleadings in the case of a claim presented to the county court: *Thorp v. Goewey*, *supra*. If the right of action was in Wolf as trustee for the French estate, upon the trial in 1882, but was in Wolf as an individual in 1886, by reason of his advance to the French estate of the money overpaid to Gharst, this change could make no difference to the Gharst estate. Wolf was still the legal claimant, whether claiming for himself or in trust for another. He could not charge the French estate with any of the costs or expenses of prosecuting the claim against the Gharst estate, even though he sued as executor, because he was suing to recover back money improperly paid out by himself.

Although the judgment entered by the court in November, 1886, was in favor of Wolf as executor, he was entitled to the money in his individual capacity. The mere addition of the word "executor" to his name would make no difference. Nor could the amount of the judgment be recovered from him by the French estate, as assets of that estate, because he could plead as an offset the amount advanced by him to the French estate to make up the over-payment to Gharst.

We think the judgment rendered by the circuit court was right. The judgment of the appellate court is therefore reversed.

MONEY PAID UNDER MISTAKE OF FACT MAY BE RECOVERED BACK: See *Appleton Bank v. McGilvray*, 64 Am. Dec. 92; *Kingston v. Ettinge*, 100 Id. 516, and notes.

EXECUTOR MAY SUE IN HIS OWN NAME ON CONTRACT MADE WITH HIM: See *Goodman v. Walker*, 68 Am. Dec. 134.

TOTEL v. BONNEFOY.

[123 ILLINOIS, 653.]

TO ACQUIRE A PRESCRIPTIVE RIGHT TO AN EASEMENT, IT MUST HAVE BEEN CONTINUOUSLY USED AND ENJOYED during the whole time prescribed by the statute of limitations.

USE AND ENJOYMENT OF TWO EASEMENTS OF LIKE CHARACTER AND IN NEARLY THE SAME LOCALITY FOR MORE THAN TWENTY YEARS does not create an easement by prescription if neither was enjoyed for the period of twenty years; so held where a party maintained a drain for sixteen years, and then constructed another drain for the same purpose, but about twenty feet distant from the first, which latter drain was maintained for more than four years.

EASEMENT FOR FLOW OF WATER. — IF TWO TRACTS OF LAND ADJOIN, the owner of the upper has a natural easement to have the water which falls on his land flow off upon the tract below.

Bull, Strawn, and Ruger, for the appellant.

Duncan, O'Conner, and Gilbert, for the appellees.

MAGRUDER, J. This is a bill filed on April 17, 1882, in the circuit court of La Salle County, by appellant, to prevent the appellees from damming up and obstructing a ditch extending across their lands from appellant's land, and through which the surface water on appellant's land was drained off into a neighboring creek. Appellant claims a natural and prescriptive easement in the ditch in question. The circuit court dissolved the injunction which had been issued, and dismissed the bill, and its decree has been affirmed by the appellate court.

Appellee Bonnefoy owns the west half of the northwest quarter of section 17, township 34, range 3 east, in La Salle County. Appellee Douvia owns the east half of the northwest quarter of said section. Appellant owns the southwest quarter of said section.

In 1861 the whole of the northwest quarter was owned by one King, and occupied by Michael Callahan, as tenant of King. At that time Totel, the appellant, owned the east half of the southwest quarter, and one Boissonas owned the west half of the southwest quarter.

In the fall of 1861 Boissonas and Callahan, with the consent and approval of King, constructed a ditch through the center of the northwest quarter, and running from the north line of the southwest quarter to a slough in the northern part of the northwest quarter. The course of this ditch, which is spoken of in the testimony as the old ditch, was a little west of the dividing line between the west half of the northwest quarter and the east half of the northwest quarter. It was made for the purpose of draining the water into Buck Creek from the west half of the southwest quarter, then belonging to Boissonas, and from the northwest quarter, then belonging to King.

Appellant afterwards bought the west half of the southwest quarter from Boissonas, and thus became the owner of the whole of the southwest quarter. One Peter Carpenter subsequently became the owner of the west half of the northwest quarter, and sold it to appellee Bonnefoy, who owns it at the present time. One Maurice Keating subsequently became the owner of the east half of the northwest quarter, and sold it to appellee Douvia, who now owns the same.

The ditch, so constructed in the fall of 1861, was used for the purpose of draining the water from the southwest quarter of the section from that time up to the year 1877, a period of sixteen years.

In 1877, Carpenter, Douvia, and appellant constructed what is called the new ditch from the south to the north line of the northwest quarter on the line between the east half and the west half of the northwest quarter, and from fifteen to twenty or twenty-five feet east of the old ditch. This new ditch was constructed by the joint labors of appellant as the owner of the southwest quarter, and of Carpenter and Douvia as the owners of the northwest quarter, and for the joint and mutual benefit of all such owners. In digging the ditch, Carpenter furnished one team, Douvia one team, and the appellant two teams.

After the new ditch was constructed in 1877, it still continued to be used for the purpose of draining appellant's property, the southwest quarter of the section, up to the spring of 1882, when it was obstructed, as above stated. The proof shows it to have been wider and deeper than the old ditch.

Two questions are presented for our consideration. The first arises out of the claim made by appellant, that he has a prescriptive right to maintain and keep open a ditch through

the northwest quarter of the section on or near the dividing line between the east half and west half thereof, by reason of the fact that one had been dug and maintained by him and his grantors for more than twenty years prior to the wrongful acts complained of, and that, for more than twenty years, such right of drainage across the northwest quarter had existed in the owners of the southwest quarter without question, and hence that an easement existed by prescription.

In *Vail v. Mix*, 74 Ill. 127, we held that a right to overflow land may, like easements in general, be acquired by an uninterrupted and adverse enjoyment for twenty years. In this case the evidence shows that the owners of the southwest quarter used the old ditch for the purpose of draining off their surface water from the fall of 1861 to 1877, and that they used what is called the new ditch for such purpose from 1877 to the spring of 1882. We do not deem it necessary to examine further into the facts of this case to determine whether an easement in the old ditch would have been acquired by prescription if the appellant and his grantor Boissonas had used the old ditch for the purpose of drainage for a period of twenty years. It appears, from the undisputed evidence in the case, that such old ditch was only used for such purpose for a period of about sixteen years. It was then filled up and a new ditch was dug on a line some twenty or twenty-five feet to the eastward. The latter ditch, built in 1877, was used for the purpose of draining the southwest quarter for a period of more than four years, and up to the time of the making of the obstructions complained of. There was no continued and uninterrupted use of either one of the ditches for a period of twenty years. We do not think that the time of the use of the new ditch can be added to or tacked on to the time of the use of the old ditch so as to make a prescriptive period of twenty years.

It seems to be held in a number of cases in Massachusetts, that, under such a state of facts as is here presented, the right to an easement in the new ditch would be acquired by prescription. But Washburn in his work on real property, 5th ed., vol. 2, pp. 357, 358, in an exhaustive note, reviews the authorities upon the subject, and comes to the conclusion that the Massachusetts decisions are not sustained by the weight of authority. He says, in regard to the case of *Pope v. Devereux*, 5 Gray, 409, as follows: "If it maintains the doctrine that an existing easement may be exchanged by parol for another

easement of the same kind, and the owner thereby acquire the same property in the new one as he had in the former, and a title to the same equally valid, it is apprehended that it cannot be sustained, either upon principle or authority." We are therefore of opinion that no right to the use of the ditch made in 1877, which is the ditch that was obstructed by appellees, was acquired by prescription.

The second question presented by the record arises upon the claim of the appellant that he had a natural easement to the drainage in question by reason of the fact that the natural flow of water was on substantially the same line as the ditch in controversy, and that there was, in a state of nature, a bed or channel of a branch of Buck Creek, through which the surface water flowed long prior to the construction of the ditch, and that the ditch simply enabled the water to pass off, in substantially the same course, more rapidly.

In *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627, we said: "It may be regarded as a well-settled principle of law, that where two farms adjoin, and one lies lower than the other, the lower farm will be subject to the natural flow of water from the one which lies in a more elevated position. . . . The owner of the upper field, in such a case, has a natural easement, as it is called, to have the water that falls upon his own land flow off the same upon the field below, which is charged with a corresponding servitude in the nature of dominant and servient tenements." Washburn on Easements and Servitudes, page 353, says: "It may be stated as a general principle that, by the civil law, where the situation of two adjoining fields is such that the water falling or collected by melting snow, or the like, upon one naturally descends upon the other, it must be suffered by the lower one to be discharged upon his land, if desired by the owner of the upper field."

Such being the law, it becomes a question of fact whether, in this particular case, appellant was entitled to the natural easement above mentioned. As we understand the contentions of the parties, it is claimed, on the part of the appellant, that the natural flow of water from appellant's land was northerly through the middle of the northwest quarter, and on the part of the appellees, that such natural flow was northeasterly through the southeast corner of that quarter. Ten witnesses sustained the position of the appellant on this question, and eight witnesses supported the position of the appellees. There was thus a sharp conflict between the testimony on the one

side and on the other. The chancellor who tried the case in the court below saw the witnesses, and heard their evidence. He came to the conclusion that, upon this question of fact, the merits of the controversy were with appellees. After a careful examination of the evidence, we are not prepared to say that the conclusion reached by the circuit judge is not correct.

The judgments of the circuit and appellate courts are therefore affirmed.

UPPER LAND-OWNER HAS EASEMENT TO HAVE WATER which falls upon his land flow off naturally upon the tract below: *Boynton v. Longley*, 3 Am. St. Rep. 781, and note.

CONTINUOUS USE OF EASEMENT DURING WHOLE TIME PRESCRIBED BY STATUTE OF LIMITATIONS will create prescriptive right thereto: *Wright v. Moore*, 82 Am. Dec. 731; *Chollar-Potosi M. Co. v. Kennedy*, 93 Id. 409.

WETHERELL v. EBERLE.

[123 ILLINOIS, 666.]

CONFLICT OF JURISDICTION. — STATE COURT HAS JURISDICTION TO REMOVE A CLOUD FROM PLAINTIFF'S TITLE created by a sale of his property under a judgment entered in one of the national courts against another person.

SUIT TO QUIET TITLE TO REAL PROPERTY OR TO REMOVE A CLOUD THEREFROM cannot be sustained in Illinois unless plaintiff is in possession thereof, or unless the lands are unimproved and unoccupied; and a bill which does not aver that the complainant is in possession of the property, nor that it is unoccupied, must be dismissed for want of equity.

ALL MATTERS WHICH GO TO THE JURISDICTION OF A COURT OF EQUITY may be taken advantage of by demurrer, whether specially pointed out or not. This defect may be suggested *ore tenus* on the argument.

James R. Mann, for the appellant.

Julius Goldzier, for the appellee.

MULKEY, J. Louisa Eberle brought her bill in the superior court of Cook County, against the appellant, James W. Wetherell, to remove an alleged cloud upon her title to certain real estate, particularly described in the bill. It appears from the bill that the property in question originally belonged to appellee's father, from whom she derives title; that after her title accrued, it was sold by A. M. Jones, United States marshal, under a judgment and execution against her husband, to the appellant, and that the latter subsequently received a marshal's deed therefor, which constitutes the alleged cloud on

her title. The court overruled a demurrer to the bill, and the defendant declining to answer further, a decree was entered in conformity with the prayer thereof, to reverse which Wetherell prosecutes this appeal.

The question presented by the record for determination is the sufficiency of the bill on demurrer. It is alleged in the demurrer that the plaintiff is not entitled to the relief prayed,— 1. "Because it appears that said court has no jurisdiction in regard to the matters in said bill set forth, the same relating to the acts of the United States court and its officers"; 2. "And because it is not shown but that complainant has an adequate remedy at law by ejectment." If either of these grounds of demurrer is well taken, the decree of course will have to be reversed.

As to the first ground, we think the law is with appellee. Upon this branch of the subject, it is urged that the decree, under the facts disclosed, is an unwarrantable interference with legal proceedings in a federal court, the tendency of which is to bring about a conflict of jurisdiction between that and the state courts; and *Logan v. Lucas*, 59 Ill. 237, *Munson v. Harroun*, 34 Id. 422, 85 Am. Dec. 316, and *Sproehnle v. Dietrich*, 110 Ill. 202, are relied on as sustaining that view. As to the first two cases, which are referred to and commented upon in the last, they are clearly distinguishable from the present, and fall far short of sustaining appellant's position. The last case, which goes to the very verge of the law in that direction, does not, in our opinion, go to the extent claimed, and there is a marked distinction between it and the present case. In that case, the United States marshal, it is true, had, as in this, made a sale of the land under a regular judgment and execution, and had issued to the purchaser a certificate of purchase; but here the similarity between the cases ceases. In the *Sproehnle* case, the marshal had yet another important duty to perform with respect to the property if not redeemed; namely, to execute a deed to the purchaser, the time for redemption not having then expired. The threatened injury was not consummated. The maturing title was *in fieri* merely, and might be defeated altogether by a redemption of the property. In the present case, there is no element of that kind. Here not only the United States court, but all its officers, have ceased to have any power, control, or jurisdiction over the case. The time of redemption has expired, and the marshal's deed has been delivered. Such being the case, no ground is

perceived for the claim that the decree in the case may lead to jurisdictional complications between federal and state courts. Nor does the present suit attempt to review, revise, or interfere with the judgment or process of the United States court. Nor, indeed, does it question the validity, or even the regularity, of the sale under the execution. The lower court, by its decree, simply found that appellee's husband, who was supposed to own the land in question at the time it was levied upon and sold by the United States marshal, had no title to it, and that consequently nothing passed by the marshal's deed. The question as to the validity of his title was not before the United States court, and consequently it could not have been passed upon by that court. There was clearly no objection to the bill on this ground.

Coming now to the other alleged cause of demurrer, namely, that "it is not shown but that complainant has an adequate remedy at law, by ejectment," that presents a much more serious question. It is said in *Hardin v. Jones*, 86 Ill. 313: "There are only two cases under our law in which a party may file a bill to quiet title, or to remove a cloud from the title to real property: 1. When he is in possession of the lands; 2. When he claims to be the owner, and the lands in controversy are unimproved and unoccupied." This is conceded to be a correct statement of the law. In the present case, it is neither averred that the complainant was in possession of the lands, nor that they were unimproved and unoccupied. The bill, therefore, was bad in substance. The defect in it, as is clearly shown by the case cited, went to the jurisdiction of the court, in the limited sense in which that term is often used in equity. This, also, is admitted. But it is claimed that the defect in the bill is not pointed out in the demurrer, and that therefore the point is waived. This position, even conceding the fact to be as claimed, is not tenable. All matters which go to the jurisdiction of the court may be taken advantage of by demurrer, whether specially pointed out in the demurrer or not, for whenever it appears that the case made by the bill is not brought within the class of cases in which courts of equity assume the power to hear and determine, it shows, in the technical sense of the expression, "there is no equity in the bill"; and this defect may be pointed out *ore tenus* on the argument: 1 Daniell's Chancery Practice, 608, 656, 658, and notes. Indeed, this doctrine is so elementary in its character, and has been so often recognized by this court, that it

does not require argument or authority for its support: *Gage v. Abbott*, 99 Ill. 366; *Gage v. Griffin*, 103 Id. 41.

But the claim that the defect in the bill is not pointed out in the demurrer is not justified by the facts. The demurrer alleges that "it appears that said court has no jurisdiction in regard to the matters in said bill set forth, . . . because it is not shown but that complainant has an adequate remedy at law, by ejectment." In view of this distinct allegation in the demurrer, it is difficult to conceive what more was wanted to call attention to the fact that there was no averment in the bill that the complainant was in possession of the premises, or that they were vacant and unoccupied. We are clearly of opinion the demurrer to the bill should have been sustained.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

LEGAL TITLE TO LAND CANNOT BE TRIED IN SUIT to quiet title, or to remove a cloud therefrom: *Fontaine v. Hudson*, 3 Am. St. Rep. 515; *Union Iron Works v. Bassick Mfg. Co.*, 10 Col. 24; and the plaintiff must show title in himself: *Johnson v. Murray*, 2 Am. St. Rep. 174.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

INDIANAPOLIS AND ST. LOUIS R'Y Co. *v.* WATSON.

[114 INDIANA, 20.]

INSTRUCTION MUST BE TAKEN AS AN ENTIRETY, and in connection with the others of the series referring to the same subject and immediately connected with it; and if, when so taken together, such instructions express the law, they afford no just ground of complaint, even though an isolated and detached clause is, in itself, an inaccurate or incomplete statement of the law.

EMPLOYEE WHO CONTINUES IN SERVICE OF HIS EMPLOYER AFTER NOTICE OF DEFECT AUGMENTING DANGER of the service assumes the risk as increased by the defect, even though he may object or complain, unless he is induced to continue by an express or implied promise of the master to remove the cause that augments the danger.

IF EMPLOYEE'S SERVICE CANNOT BE CONTINUED WITHOUT CONSTANT AND IMMEDIATE DANGER, which is so great that a reasonably prudent man would not assume it, and its character as well as the danger itself are fully known to the employee, he assumes the risk if he continues in the service, although his employer had promised to remedy the defect.

NEGLIGENCE, WHEN NOT A QUESTION OF FACT. — Where there is no conflict of testimony, the court must necessarily decide the legal effect of the testimony in the record. In doing this, there is no departure from the long-settled rule that the evidence will not be weighed by this court.

J. T. Dye, for the appellant.

S. M. Shepard, J. B. Elam, and C. Martindale, for the appellee.

ELLIOTT, J. Stated in a condensed form, the material allegations of the complaint are these: The appellant maintained a freight-yard near the city of Indianapolis, in which there were many tracks and switches used for handling locomotives

and cars. On the fifteenth day of October, 1882, the appellee was in the service of the appellant as a night watchman. His duties as such watchman were to go about and over the yard at all hours of the night, and look after the property of his employer, and to wake up at the proper time its employees. The appellant knew that it was necessary that the watchman should be provided with a light in order that he might properly discharge his duties, and at the same time protect himself from danger; yet the appellant refused to provide a light. A day or two after the appellee had been so employed, he notified his employer that it was necessary for him to have a light in order to discharge his duties and to protect himself. His employer promised to procure a light for him in a short time, and requested him to continue in the performance of his duties. Relying on this promise, he did continue in the appellant's service, but the light was not provided as promised. On the night of November 1, 1882, he was injured, without any fault on his part, while in the discharge of his duties, and his injury was caused by the wrong and negligence of the appellant in failing to provide him with a lantern.

The fourth instruction given by the court reads thus: "The general rule is, that when a servant, before he enters the service, knows it to be hazardous, or voluntarily continues his service, without objection or complaint, when he has such knowledge, he is presumed to contract with reference to the state of things as they are known to him, and if knows that the continuance of such service exposes him to constant and certain danger, the servant in such cases takes the risks upon himself, and in case he suffers injury thereby, he waives all claims for damages against his master for such injury. As has been said in argument, the master is not required to take better care of his servant than he takes of himself."

Appellant's counsel dissects this instruction, and seizing on the words "without objection or complaint," assails it as erroneous.

This course cannot be successfully pursued. The instruction must be taken in connection with the others of the series, and cannot be considered as standing alone. An instruction is not to be judged by taking mere fragments dislocated from their proper connections, nor is one instruction to be taken as complete in itself. This instruction must, as is well settled, be taken as an entirety, and in connection with the others

referring to the same subject and immediately connected with it: *City of Indianapolis v. Gaston*, 58 Ind. 224; *Deig v. Morehead*, 110 Id. 451.

We must, therefore, take the fourth instruction in connection with that bearing upon the same subject, which is as follows:—

“6. To the general rule I have announced in relation to a servant who, with a knowledge of the dangers of the service, continues in it, there is at least this exception, that if a servant knows that his service is dangerous, and that he has not been provided with proper means or implements for the reasonably safe performance of the duties of his employment, and makes complaint to his master, who promises that suitable and proper implements shall be provided him to render his service less dangerous, then such servant may continue in the service a reasonable time, and may recover for an injury sustained by him within such time, if, on account of the master's negligence in failing to supply the means of avoiding danger, the injury results; provided such servant at the time of the injury was not guilty of any negligence which contributed to produce the injury. His care must be also proportioned to the danger; when the one is increased, the other must be also. Yet all that is required is ordinary care under the circumstances of the case. And you must determine from the evidence in the case what would be a reasonable time within which he might continue in the master's service under said promise, if any was made, and also what would be ordinary care,—that is, such care as an ordinarily prudent and cautious person would exercise under the circumstances of the case. The want of such care is what the law terms negligence.”

If these instructions, taken together, express the law, then the appellant has no just cause of complaint, even though the isolated clause which counsel detaches and assails should in itself be regarded as an inaccurate statement of the law. Our conclusion is, that when the instructions are so taken they express the law as favorably to the appellant as it had a right to ask.

The first of these instructions does not assert that those employees who continue in the master's service, “without objection or complaint,” do not assume the usual risks of the service. It simply asserts that all who do continue “without objection or complaint” do assume the risks incident to the service; but it by no means asserts that those who do complain and

object do not also assume those risks. Possibly, the instruction standing alone may be incomplete, but it cannot be justly said to be erroneous, since it may be true that all who continue in a service without objection do assume the risks as well as those who do make objections. But, however this may be, it is sufficiently evident that the fourth instruction is made complete by the sixth, and there is, therefore, no available error.

The next step takes us into a field of stubborn conflict. There are authorities holding that, where the employee objects to the safety of the appliances furnished him, the employer is liable if the employee is injured while in the employer's service, and within a reasonable time after urging the objection: *Union Mfg. Co. v. Morrissey*, 22 Am. Law Reg. 574; *Thorpe v. Missouri Pacific R'y Co.*, 89 Mo. 650; 58 Am. Rep. 120; 2 Thompson on Negligence, 1009.

A careful examination of the other authorities relied on by appellee's counsel has satisfied us that they do not decide all that it is asserted that they do.

In *Holmes v. Clarke*, 6 Hurl. & N. 349, the master neglected to fence a dangerous place, as an act of Parliament required him to do, and a servant was awarded a recovery for injuries caused by this negligence. Leaving out of consideration the element introduced by the positive legislation, although it is by no means clear that the act of Parliament did not exert an important influence, we yet conclude that the case does not sustain appellee's position: *Wabash etc. R'y Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193.

This conclusion we rest upon these words of the opinion in the case cited by counsel: "Where machinery is required by an act of Parliament to be protected, so as to guard against danger to persons working it, if a servant enters into the employment when the machinery is in a state of safety, and continues in the service after it has become dangerous in consequence of the protection being decayed or withdrawn, but complains of the want of protection, and the master promises to restore it, but fails to do so, we think he is guilty of negligence, and that if any accident occurs to the servant he is responsible." The promise of the master formed, it is obvious, an important factor in the case, and exerted a controlling influence on the judgment of the court.

There are some expressions in *Greene v. Minneapolis etc. R'y Co.*, 31 Minn. 248, 47 Am. Rep. 785, that seem to support the

appellee's contention, but the ultimate decision is against him. It was there said: "If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has in law or natural justice to insist that it shall be done at the risk of the servant and not his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use under a promise thereafter to repair it." At another place, the court, in speaking of the general rule, asserts that the master is liable where the servant gives notice of the defects and the master "thereupon promises that they shall be remedied."

The utmost that can be deduced from the case under immediate mention is, that the servant may continue in the service a reasonable time after the promise to make the machinery or appliances safe, and that if he is injured within that time he may maintain an action.

The cases of *Kroy v. Chicago etc. R. R. Co.*, 32 Iowa, 357, *Greenleaf v. Dubuque etc. R. R. Co.*, 33 Id. 52, *Muldowney v. Illinois Central R. R. Co.*, 39 Id. 615, *Lumley v. Caswell*, 47 Id. 159, and *Way v. Illinois Central R. R. Co.*, 40 Id. 341, do not, as we understand them, go further than to hold that the master is not liable where the servant continues in his service with notice of its danger, unless he has induced the servant to do so by an express or implied promise. In *Way v. Illinois Central R. R. Co.*, *supra*, it was held error to refuse an instruction containing this clause: "If a brakeman on a railroad knows that the materials with which he works are defective, and continues his work without objecting, and without being induced by his master to believe that a change will be made, he is deemed to have assumed the risks of such defects." This, we think, implies that there must be a promise either in express words, or arising by fair implication from the conduct of the master. Going back to the case of *Kroy v. Chicago etc. R. R. Co.*, *supra*, we find the principle upon which the subsequent decisions rest, for they are all built upon that case. It was there said: "Another important modification of the liability of a master for an injury to an employee, which is sustained by an almost unbroken current of authority in this country and in England, is, that if a servant knows that a fellow-servant is habitually negligent, or that the materials with which he works are defective, and continues his work without objecting, and without being induced by his master to believe that a

change will be made, he is deemed to have assumed the risk of such defects." This ruling certainly does not sustain the appellee's contention that if an objection and protest are made the master becomes liable. The case of *Snow v. Housatonic R. R. Co.*, 8 Allen, 441, 85 Am. Dec. 720, cannot be regarded as in point upon this question, nor can the case of *Indiana Car Co. v. Parker*, 100 Ind. 181, for both of these cases simply affirm the general rule that it is the duty of the master to provide his servants with a safe working-place and with safe machinery and appliances.

In *Patterson v. Pittsburgh etc. R. R. Co.*, 76 Pa. St. 389, 18 Am. Rep. 412, there was an express promise on the part of the master, and that fact gives a controlling force to the decision there made. We are referred to Dr. Wharton's statement that "in this country the exception has been still further extended, and we have gone so far as to hold that a servant does not, by remaining in his master's employ, with knowledge of defects in machinery he is obliged to use, assume the risks attendant on the use of such machinery, if he has notified the employer of such defects, or protested against them, in such a way as to induce a confidence that they will be remedied": Wharton on Negligence, 1st ed., sec. 221.

If it were conceded that this is a correct statement of the law, still it would not supply a premise for the conclusion that an objection or protest exempts the servant from the general rule that he assumes the risk, for it is implied that something must be done by the master to induce the belief that the defect will be remedied, and it is difficult to conceive what other thing than a promise, express or implied, can be regarded as sufficient to induce such a belief. We find, on examining the later edition of Dr. Wharton's book, that he adds to what is copied from the earlier edition by counsel these words: "Such confidence being based on the master's engagements, either express or implied," and modifies the statement in other respects: Wharton on Negligence, 2d ed., sec. 220.

This author is, indeed, inclined to condemn the exception to the general rule, even as he states it, for he says: "The only ground on which the exception before us can be justified is, that in the ordinary course of events the employee, supposing the employer has righted matters, goes on with his work without noticing the continuance of the defect. But this reasoning does not apply, as we have seen, to cases where the employee sees that the defect has not been remedied, and yet intelli-

gently and deliberately continues to expose himself to it": Wharton on Negligence, 2d ed., sec. 220.

The rule which we regard as sound in principle and supported by authority may be thus expressed: the employee who continues in the service of his employer, after notice of a defect augmenting the danger of the service, assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. The promise of the master is the basis of the exception. If the promise be absent, the exception cannot exist. In support of our conclusion, we refer to these authorities: *Russell v. Tillotson*, 140 Mass. 201; *Linch v. Sagamore Mfg. Co.*, 143 Id. 206; *Hatt v. Nay*, 144 Id. 186; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; 77 Am. Dec. 212, 218, and authorities in note; *Galveston etc. R. R. Co. v. Drew*, 59 Tex. 10; 46 Am. Rep. 261; *Webber v. Piper*, 38 Hun, 353; *Pennsylvania Co. v. Lynch*, 90 Ill. 333; Wood on Master and Servant, 21; Beach on Contributory Negligence, 372.

The rule absolving the servant from the assumption of risks is an exception to the general rule, for the general rule is, that the servant does assume all the ordinary risks of the service he enters. There must, therefore, be some ground for the exception, and the only solid ground that can be found is the inducement held out by the agreement of the master. If this be not so, then an employee at his first entrance into service might object and protest, and successfully claim that he was exempt from the perils of the service. Or, if our theory be not sound, a mere complaint or objection might, in effect, overturn the general rule, and this would result in confusion and uncertainty. We can see no way to hold that the servant is exempt from the known risks of his service where there is no express or implied contract on the part of the master, without completely nullifying the general rule. The servant is at liberty to quit the service, and if he remains after knowledge of its danger, he assumes the risks, even though he may object or complain, unless he is induced to continue by a promise of the master to remove the cause that augments the danger; since, if this be not true, it must be true that any objection or complaint made at any time will absolve him from the risk, and this conclusion cannot be sustained. As the exception concedes and tries the general rule, it cannot be allowed to destroy it, for if it were allowed to do this, it would cease to be an exception: *Sweeney v. Berlin etc. Co.*, 101 N. Y. 520; 54 Am. Rep. 722.

The evidence in this case, as counsel concede, shows that a lantern was essential to the service the appellee undertook to perform; that, as the appellee knew, without the lantern the act which he was engaged in performing subjected him to great danger, and he was injured while attempting to perform it. Nor does the counsel for the appellant, as we understand his argument, contend that it was not the duty of the company to provide the lantern, nor does he question the authority of the person to whom the appellee made application for one to act for the company in such cases. The central position assumed is, that the evidence does not show any promise. This is the question presented to us, and the question to which we at this point limit our decision. We are, therefore, required to determine whether there is evidence fairly supporting the verdict on this subject, and in doing so we must take that which the jury deemed credible and trustworthy: *Julian v. Western Union Tel. Co.*, 98 Ind. 327.

We cannot sustain the verdict, unless we find in the record evidence tending to prove that a promise to remedy the cause of the augmented danger of the service was made by the appellant, and that this promise induced the appellee to remain in the service after he acquired knowledge of the increased peril caused by his employer's failure to furnish him with a lantern. Two things must concur: the promise, express or implied; and the inducement created by it. If either be absent, the case fails. If no reliance was placed on the promise, there could not have been an inducement influencing the appellee to continue in the service with knowledge of its increased danger; and if no promise was made, the case is still stronger against the appellee, for in that event there could be no possible ground for the position that the employer induced him to continue in the service.

The appellee's argument on the point under discussion is, that the evidence shows "three conversations between the servant and his master's agent; the first two being friendly, and resulting in each case in a distinct promise to furnish the lantern. The third was due to the neglect of the master and the persistence of the servant, and was characterized by some angry words, but there was no withdrawal of the promises before made,—nothing but an angry, petulant remark indicating at most that the fulfillment of the promise might be delayed. That the servant continued in the service with the expectation that the master would do his duty, and looked

every night for the fulfillment of the promise. That he was sent by the agent of the master to do the particular service in which he was injured, and that he was doing his best to see the location of moving cars, and could have done so with a light, but having none, was misled as to the track the moving cars were on, from having just seen a train being made up on track No. 3, and was thus injured by a sudden jar from a car on track No. 2, which he did not expect, and had no reason to anticipate, and against which he had taken no precaution."

In substance, the argument of the appellant is this: "Instead of a promise to furnish a lantern, there was a quarrel, in which defendant's agent accused plaintiff of carrying off the lantern, and told him he would be lucky if he got another in a month. There was no promise at all. This was the last conversation upon the subject. There was no request that plaintiff should remain in defendant's service till a lantern should be furnished. The plaintiff emphatically swears that defendant's agent did not lead him to believe he would get a lantern short of a month, and that he went to work without any expectation that Howells, the defendant's agent, would get him a lantern in less than a month, and in this same conversation he threatened to lamm the agent because 'it looked like he did not care for plaintiff's safety.' Now, if there had been a promise to furnish a lantern at the end of thirty days, that would not relieve plaintiff from the risk incurred by working without a lantern for that thirty days, when, as he says, he had no expectation that a lantern would be furnished."

It is true, as appellee's counsel affirm, that there were three conversations, and that in two of them a promise was made; but it is also true that the appellee, finding that the promise was not kept, entered complaint, and was told in the last conversation that he would be lucky if he got a lantern in a month. It is likewise true that the appellee did not, after the last conversation, rely on the promise previously made, for he testified that he did not expect to be supplied with a lantern. This is his own testimony: "After I had asked him for the lantern twice, and then left orders twice, I went over early to see him myself, and told him it was dangerous,—it was a dangerous place to be without a lantern,—and it seemed like it made him out of humor, and he said: 'You may think yourself well off if you get a lantern in a month,' and then I

did not say anything more to him about it. That was two weeks before I was hurt that I asked Mr. Howells for the last time for a lantern. Well, when he would not get me a lantern, and when he spoke the way he did, I got a little excited, and when I get excited I will say what I please. He said the men need not be carrying their lanterns off; they were all charged up to them. I told him I had not lost my lantern, and had not carried it off, but put it into the box, and that if he would have a box for the night men and a box for the day men they might save their lamps. It was in this same conversation that he told me I would be lucky if I got another lantern in a month. It was after that I had a rough talk with him, because he had insulted me there, because it looked like he did not care for my safety." In answer to this question: "He did not lead you to expect that he was going to get a lantern for you short of a month in that conversation, did he?" the appellee said: "No, sir." He was also asked this question: "And you went on to work in the yard without a lantern, and without any expectation that Howells would get a lantern for you within a month, did you not?" and his answer was, "Yes, sir."

The appellee also testified that Howells was the only man he ever asked for a lantern, and thus narrates one of the first conversations: "I told him I had been pretty nearly killed down in the yard once without a lamp, and I did not want to be killed by neglect of having the lamp there; then I got a little out of fix because he did n't furnish me a lamp, and I told him I had pretty nearly got killed in that yard by being struck by a car, and all that; that is what I said, and then he promised to get me a lamp."

After the most careful study we find ourselves unable to resist the conclusion that the verdict cannot be sustained. We are constrained to hold that the appellee was not induced to remain in the appellant's service by any promise, express or implied. On the contrary, the clear and irresistible inference from the evidence is, that the promise was withdrawn, and that the appellee continued in the service, knowing its great danger, without any promise that the lantern, or lamp, required to make it safe, would be provided. He himself says that "he went on with the work without any expectation that Howells would get a lantern" for him within a month. This shows the construction put by the appellee upon the words of Howells, and it is the only natural and reasonable

construction that those words will bear. With this, the appellee's own testimony, before us, we can see no other course consistent with duty open to us save that which leads to a reversal of the judgment. We must affirm that an employee, who continues in the employer's service after he has acquired knowledge of its great and immediate dangers, assumes the risk, unless he is induced to continue in the service by a promise, express or implied.

We do not depart from the rule that an employer is bound to use ordinary care to provide a safe working-place and safe appliances for his employees; but we do hold that the rule cannot apply to such a case as this. The rule itself we regard as firmly settled: *Indiana Car Co. v. Parker*, *supra*; *Krueger v. Louisville etc. R'y Co.*, 111 Ind. 51; *Pennsylvania Co. v. Whitcomb*, 111 Id. 212.

It is the application of the rule as made by the appellee, and not the principle it asserts, that we deny. The rule asserts that the machinery and appliances must be kept safe as against those who do not know of their unsafe condition, but does not apply to those who know of their unsafe condition, and still continues in the service without being induced to do so by the employer's promise.

The employee has a right, until he acquires knowledge of danger, or by reasonable care might acquire such knowledge, to act upon the assumption that his employer will use ordinary care to provide safe appliances; but when he becomes fully informed of the danger, he can no longer act upon this assumption. Knowledge on his part puts an end to his right to assume that the master has done his duty. It is manifest that one who knows that a duty has not been performed cannot reasonably assert that he acted upon the assumption that it had been performed. The case, therefore, falls within the rule that the employee assumes the risks of all the dangers of which he has knowledge: *Pennsylvania Co. v. Whitcomb*, *supra*; *Indiana etc. R'y Co. v. Dailey*, 110 Ind. 75; *Lake Shore etc. R'y Co. v. Stupak*, 108 Id. 1; *Umbach v. Lake Shore etc. R'y Co.*, 83 Id. 191.

Where there is a promise to repair which induces the employee to continue in the service, then, doubtless, he may, for a reasonable length of time, rely on the promise and continue in the service, unless the danger of continuance, without a removal of the cause of it, is so great that a reasonably prudent man would not assume it: *Hough v. Railway Co.*, 100 U. S.

213; *Loonan v. Brockway*, 3 Rob. (N. Y.) 74; *Illinois Cent. R. R. Co. v. Jewell*, 46 Ill. 99; 92 Am. Dec. 240; *Crichton v. Keir*, 1 Ses. Cas. S., 3d series, 407.

Some of the cases go further, and assert that the promise of the employer exonerates the employee entirely, even though the continuance in the service is known to him to be constantly and immediately dangerous: *Fort Wayne etc. R. R. Co. v. Gildersleeve*, 33 Mich. 133. We are not inclined to adopt this view. Our opinion is, that if the service cannot be continued without constant and immediate danger, and the danger and its character are fully known to the employee, he assumes the risk if he continues in the service. It is a fundamental principle in this branch of jurisprudence that one who voluntarily incurs a known and immediate danger is guilty of contributory negligence, and we are unable to perceive why a promise should relieve the party injured through his own contributory fault. If the danger is not great and constant, then such a promise may well be deemed to relieve him; but where it is great and immediate, and is of such a nature that a prudent man would not voluntarily incur it, a promise does not nullify or excuse the contributory negligence. Even if there be a promise by the employer, the employee must not subject himself to a great and evident danger, since this he cannot do without participating in the employer's fault. The community have an interest in such questions, and that interest requires that all persons should use ordinary care to protect themselves from known and certain danger. A man who brings about his own death or serious bodily injury sins against the public weal. All must use ordinary care to avoid known and immediate danger, although it is not the assumption of every risk that violates this rule. When the line of danger, direct and certain, is reached, there the citizen must stop, and he cannot pass it, even upon the faith of another's promise, if to pass it requires a hazard that no prudent man would incur. Proceeding upon a somewhat different line of reasoning, other courts have reached the same conclusion as that to which we are led: *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; 14 Am. Rep. 598; *Crichton v. Keir*, *supra*; *Couch v. Steel*, 3 El. & B. 402. The general principle which rules here is strongly illustrated by the cases which hold that a passenger cannot recover for an injury received while acting in obedience to the directions of the conductor in whose charge he is, where obedience leads to a known danger which a prudent man would not

voluntarily incur: *Lake Shore etc. R'y Co. v. Pinchin*, 112 Ind. 592; *Cincinnati etc. R. R. Co. v. Carper*, 112 Id. 26; 2 Am. St. Rep. 144. If the rule prevails in such cases, much stronger is the reason why it should prevail in a case like this, where ordinary care is required of employer and employee alike; while in the class of cases referred to, the highest degree of practicable care is required of the carrier, and only ordinary care exacted of the passenger.

It is probably true that the promise of the employer, when relied on by the employee, will rebut a presumption of contributory negligence in cases where the danger is not great and immediate, but this presumption yields whenever it appears that the employee voluntarily incurs a known and immediate danger of so grave a character that it would deter a reasonably prudent man from incurring it.

In the case before us, the testimony convincingly shows that the appellee knew the danger he encountered, and it shows, also, that it was so great and immediate that a prudent man would not have assumed the risk it created. It results that even if it were conceded that there was a promise, and a reliance on it, there could be no recovery.

Reluctant as we are to set aside a verdict which has passed the scrutiny of a learned trial court, we cannot do otherwise in this instance.

Judgment reversed.

ON PETITION FOR A REHEARING.

ELLIOTT, J. In a very forcible and able brief, counsel for the appellee contend that we departed from the established rule, and weighed the evidence. In this, counsel are in error.

We took the evidence as we found it in the record, and decided, on the uncontradicted evidence, that there could be no recovery. The decision of the case, in the main, depends upon the question whether there was a promise, relied upon by the appellee, exonerating him from the consequences of his negligence in remaining in the appellant's service after he acquired full knowledge of its dangers. We have held in many cases that where the evidence fails to make out a case, the judgment will be reversed: *City of Warsaw v. Dunlap*, 112 Ind. 576; *Cincinnati etc. R'y Co. v. Long*, 112 Id. 166; *Riley v. Boyer*, 76 Id. 152; *Pittsburgh etc. R'y Co. v. Morton*, 61 Id. 539; 28 Am. Rep. 682; *Roe v. Cronkhite*, 55 Ind. 183; *Ray v. Dunn*, 38 Id. 230; *Crossley v. O'Brien*, 24 Id. 325; 87 Am. Dec. 329.

Where, as here, there is only one witness upon a pivotal point, it is our duty to apply the law to his testimony, and if, under the law, the testimony is not sufficient to sustain a recovery, so adjudge. Where there is no conflict of testimony, the court must necessarily decide the legal effect of the testimony in the record. In doing this there is no departure from the long-settled rule to which counsel refer.

The question of negligence is never one exclusively of fact. The jury find the facts, but if from the facts one inference only can be drawn, and that is, that there was negligence, it must be so adjudged as matter of law; or, conversely, if it can be clearly affirmed as matter of law that there was no negligence, the court must so declare. In no case where negligence is the issue does the court entirely abdicate its power, for as to the law it must always rule, although, in some instances, the jury ultimately decide whether there is or is not negligence; but in every case the court must declare the law.

In ruling that there is no negligence, the court does not rule upon a question of fact. Judge Holmes says: "Where a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability, and in this way the law is gradually enriching itself from daily life, as it should": Holmes's Common Law, 120.

This principle applies here, for we rule, not that there is no evidence of a fact, but that the facts proved do not create a legal liability. It has been very often decided by our own and by other courts that, where the facts are undisputed and unequivocal, the court must apply the law to them: *Wabash etc. R'y Co. v. Locke*, 112 Ind. 404, and cases cited; *Pittsburgh etc. R. R. Co. v. Spencer*, 98 Id. 186, and cases cited; *Counsell v. Hall*, 145 Mass. 468.

The doctrine that the welfare of society forbids a man from thrusting himself into immediate and certain danger without pressing necessity, remounts to the case of *Hales v. Petit*, 1 Plow. 253, a case made famous because of its having suggested, as many suppose, to Shakespeare, the grave-digger's scene in *Hamlet*. Although the reasoning of that case is quaint and fanciful, still the principle asserted is a wise one, and has long formed part of our jurisprudence.

We did not assert in our former opinion that an employee, who takes a risk that imperils his safety, cannot maintain an

action; but we did decide that if he knowingly and deliberately assumes a risk that will lead him into immediate and certain danger, he cannot recover, although his employer had promised to remedy the defect. The authorities we cited sustain this principle, and we applied it to the uncontradicted evidence. Where, as here, there is only one witness to a material fact, we must act upon his testimony, and in applying a principle to it we do not weigh evidence: *Cincinnati etc. R. R. Co. v. Long*, 112 Ind. 166; *Palmer v. Chicago etc. R. R. Co.*, 112 Id. 250.

It may be that on another trial the evidence may be such as to take the case out of both the rules here stated, for it may well be that additional evidence will explain the testimony given by Mr. Watson, or prove circumstances giving it a different meaning and effect; but as the record presents the case to us, we find, by applying the law to the evidence, that the verdict is not supported.

Petition overruled.

FAILURE TO PERFORM DUTY WHICH IS WELL DEFINED IS NEGLIGENCE, and may be so declared by court; but when the measure of duty is varying, a higher degree being required under some circumstances than under others, and which it is necessary to ascertain as a fact, the question is for the jury: See *Arnold v. Pennsylvania R. R. Co.*, 2 Am. St. Rep. 542, and note 545, 546, citing many cases.

MASTER'S DUTY TO FURNISH EMPLOYEE WITH SAFE PLACE IN WHICH TO WORK, and safe tools to work with: *Lewis v. Seifert*, 2 Am. St. Rep. 651, and note; *Moynihan v. Hills*, 4 Id. 348; *Gutridge v. Missouri Pacific R'y*, 4 Id. 392; *Little Rock Co. v. Leverett*, 3 Id. 230.

INSTRUCTIONS MUST BE CONSTRUED AS A WHOLE, and if, when thus considered, they are correct, the judgment will not be reversed because a single instruction, or a part of an instruction, taken by itself, is inaccurate or incomplete: See note to *Strohn v. Detroit etc. R. R. Co.*, 99 Am. Dec. 130.

EMPLOYEE CONTINUING IN SERVICE AFTER NOTICE OF DEFECT augmenting danger of the service assumes the risk of injury therefrom, and cannot recover: *Buzzell v. Laconia M. Co.*, 77 Am. Dec. 225; *Thorpe v. Missouri Pac. R'y Co.*, 58 Am. Rep. 120, and note; *Stroble v. Chicago etc. R'y Co.*, 59 Id. 456; *Texas Pac. R'y Co. v. Bradford*, 59 Id. 639; *Porter v. W. N. C. R. R. Co.*, 97 N. C. 66; *Philadelphia etc. R. R. Co. v. Hughes*, 119 Pa. St. 301; *New York etc. R'y Co. v. Lyons*, 119 Id. 324; unless his continuance in the service is by reason of the master's promise to repair the defect within a reasonable time, which time has not expired: *Eureka Co. v. Bass*, 60 Am. Rep. 152, and note; note to *Buzzell v. Laconia M. Co.*, 77 Am. Dec. 224; note to *Chicago etc. R. R. Co. v. Swett*, 92 Id. 217; with, however, this condition, that the master's promise to repair will not relieve the servant of the imputation of contributory negligence, if the defect is such as to indicate immediate danger, which a reasonable man would not assume: See the principal case.

BLAIR v. SMITH.

[114 INDIANA, 114.]

TRUSTEE. — WHERE HUSBAND EXPENDS MONEY UPON WIFE'S REAL ESTATE TO DEFRAUD HIS CREDITORS, and she knows of such intent and colludes with him to effect that purpose, she occupies the position of a fraudulent grantee, and is a trustee for the creditors, and accountable to them in equity to the extent of the money so expended, whether it remain in the land, or is afterwards converted by a sale into money which she retains.

WHERE HUSBAND, WITH INTENT TO DEFRAUD HIS CREDITORS, GIVES HIS WIFE MONEY, which she, with full knowledge of that purpose, accepts and yields no consideration, she holds it as trustee for such creditors and must account to them for it in equity.

PLEADING — JURISDICTION — EQUITY. — It matters not under the code of Indiana what the form of the action, if the facts stated sustain the theory on which the complaint proceeds, the plaintiff is entitled to the relief he seeks even if equitable relief be demanded.

PRACTICE. — ATTACHMENT PROCEEDINGS MAY PROPERLY BE QUASHED, WHERE AFFIDAVIT fails to show, as required by statute, that the property sought to be reached was subject to execution.

TRANSFER OF PROPERTY EXEMPT FROM EXECUTION CANNOT BE FRAUDULENT as against creditors.

J. E. Rose, J. W. Baxter, and W. L. Penfield, for the appellant.

J. I. Best, C. A. O. McClellan, and D. A. Garwood, for the appellees.

ELLIOTT, J. The facts, as stated by the first paragraph of the complaint, are these: Norman Smith was the debtor of Benjamin Blair in the sum of one thousand dollars, for which judgment was recovered. Executions were issued, and returned no property found. Prior to the time the judgment was rendered, the wife of Norman Smith, Julietta, owned eighty acres of land, and as part of the purchase-money she agreed to pay liens on the land amounting to the sum of one thousand dollars. This sum the husband paid, although he then had no property subject to execution, as his wife knew. He paid the money with the fraudulent intent of cheating his creditors, of which fact his wife had knowledge, and to enable him to defraud his creditors colluded with him to effect that purpose. Since it was paid she has sold the land, and has, as the complaint charges, possession of the avails of the sale, and has in her possession one thousand dollars above the value of her interest, as the trustee of his creditors.

The appellant's counsel, with much force and plausibility,

argue that, as Mrs. Smith occupies the position of a fraudulent grantee, and colluded with her husband to defraud his creditors, she is liable, in the character of a trustee, to account to them for the amount over and above the value of her interest in the land.

It is now settled, whatever of error may have crept into some of our decisions, that a judgment creditor has a lien only on the interest of the debtor in the land, and that against such a creditor prior equities will prevail: *Glidewell v. Spaugh*, 26 Ind. 319; *Monticello etc. Co. v. Loughry*, 72 Id. 562; *Hays v. Reger*, 102 Id. 524; *Foltz v. Wert*, 103 Id. 404, and cases cited; *Wright v. Tichenor*, 104 Id. 185, and cases cited; *Wright v. Jones*, 105 Id. 17; *Heberd v. Wines*, 105 Id. 237; *Taylor v. Duesterberg*, 109 Id. 165.

It is clear, therefore, that the interest that Mrs. Smith had in the land is superior to the appellant's claim. We do not, however, understand the appellant's counsel to controvert this doctrine, but their position is, that the creditor has a right to charge her with the money in her hands received from the sale, after deducting the value of her interest in the land. The husband, as against her, acquired no interest in the land, but as against creditors the money belonging to him which went into the land can be reached in equity, because, as the complaint alleges, the wife put it there to defraud creditors.

Whether the husband could or could not impair the interest of the wife if she had not actively participated in the fraud, is not the question; but the question is, Can the money that went into the land by the fraud of both husband and wife be followed by the creditors of the husband? This is the question the record presents. We think it clear that in equity the creditors may pursue the money into the land. Suppose, for example, that the price of the land was two thousand dollars, and that the wife paid only ten dollars of this sum, and the husband, colluding with the wife in a fraudulent scheme to defraud his creditors, paid nineteen hundred and ninety dollars, could not a judgment creditor reach the money thus fraudulently put into the land? We are unable to see why the money of the husband may not be subject in equity to the claims of his creditors, in the case supposed, nor can we perceive any difference between the supposed case and the actual one.

The question here is very different from that presented in

French v. Sheplor, 83 Ind. 266; 43 Am. Rep. 67. In that case the beneficiary sought to secure land bought by the trustee, but partly paid for with trust funds. Here the charge is, that the wife colluded with the husband to defraud his creditors; and to carry into execution their corrupt scheme, she suffered him to use his money in paying for the land. If at the time the land was purchased this had been done, no one would doubt that the husband would have acquired an interest in the land which a judgment creditor might subject to the payment of his debt. We can discern no difference between a case where the husband and wife conspire to defraud creditors prior to the purchase of property, and a case where the conspiracy is not formed until after the purchase of the land. Our conclusion on this branch of the case is, that when the husband, pursuant to the corrupt scheme, invested one thousand dollars in the land, he acquired, as against creditors, but not as against the wife, an interest upon which equity will fasten the lien of the judgment, but that the lien did not displace the prior equity of the wife.

If our conclusion is correct, then as long as the wife remained the owner of the land, the husband, in equity, and as in favor of a judgment creditor, owned an interest in the land, subject to the lien of the judgment, as against one who had conspired with him for the purpose of defrauding creditors. If this be not true, then a debtor may collude with another to defraud his creditors, and by investing money in the land, carry into execution a corrupt scheme, and enable the debtor to evade the payment of his debts. Equity will not permit this.

Approaching the question from a somewhat different point, we arrive at the same conclusion. If the money paid on the price of the land belonged to the debtor, equity would have compelled him to pay it to his creditor, and from this rule he cannot escape under cover of a fraudulent collusion with the owner of the land. No one can reap any advantage from a fraud. As the money to which equity gave the appellant a claim went into the land, into the land equity will follow it. "Equity regards that as done which ought to have been done," and upon this maxim rests many of the most salutary rules of equity, and among them that of equitable conversion. It is no more beyond the power of a court of equity to reach the money in the land than it would have been had the money been fraudulently placed in the hands of Mrs.

Smith, to be there kept for the corrupt purpose of defrauding her husband's creditors.

Our statute goes very far in condemnation of schemes to defraud creditors, and denounces as void all contracts made for that purpose: R. S. 1881, secs. 2156, 4920. Land fraudulently conveyed is subject to the judgment, by express provision of our statute: Id., sec. 752; *Hanna v. Aebker*, 84 Ind. 411.

As held in the case cited, where a person purchases or acquires an interest in land, and, for the purpose of defrauding creditors, does not take title, equity will treat that as having been done which ought to have been done, and, in favor of creditors, will treat the purchaser as having title.

Counsel for the appellees are in error in treating Mrs. Smith as the mere debtor of her husband. The complaint does not proceed upon that theory. It proceeds on the theory that, by reason of the fraudulent collusion with her husband, she obtained property which in equity and good conscience should be applied to the debt due from her husband to the appellant. She is not sought to be held as his debtor. She is sought to be held as the trustee of her husband's creditor. It is a principle quite as well established as any in equity jurisprudence, that a grantee who fraudulently accepts a conveyance of land, for the purpose of enabling the grantor to defeat his creditors, takes the land as the trustee of the creditors. This doctrine is so well settled that it is scarcely necessary to cite authorities in its support: *Eiler v. Crull*, 112 Ind. 318; *Eve v. Louis*, 91 Id. 457; *Jones v. Reeder*, 22 Id. 111. If, therefore, Mrs. Smith had retained the land, she might undoubtedly have been charged as the trustee of her husband's creditors to the extent of his interest in the land. Whether this would be so if there were no actual fraud, we need not inquire, for there was here not only knowledge of the fraudulent intent of the husband, but the wife actively assisted him in carrying into execution his fraudulent purpose by conspiring with him to defeat his creditors. Whatever may be the rule where the wife simply permits her insolvent husband to advance money to pay for her land, the rule in a case like this, where she is a guilty actor in the fraud, is, that she cannot defeat the claim of her husband's creditors, although the creditors cannot destroy her prior equities. The element of actual fraud we regard as an important one in all the phases of the case. We decide the case as it is presented to us by

the complaint, and upon the facts there alleged and admitted by the demurrer, and that case is one of direct positive fraud, and not merely legal or constructive fraud.

We conclude, without hesitation, that, had the wife remained the owner of the land, equity might have charged her as holding it in trust to the extent of the money fraudulently put into it by her husband; and we are now to inquire whether, as to the avails of the sale in her hands in excess of her interest in the land, she can be required to account to her husband's creditor as a trustee. We have already alluded to the doctrine of equitable conversion, and we now apply it to the money in the hands of Julietta Smith. As to the creditors, equity may treat that money as it would have treated the land had the title remained in her. We are not willing to hold that the change in the character of the property changed the equities of the parties. Suppose that, instead of getting money for the land, Mrs. Smith had exchanged it for another parcel of land, might not the appellant have reached the husband's interest in that land? It seems clear to our minds that the change from one parcel of land to another would not have destroyed the appellant's equity; and surely, the change from one species of property to another cannot affect the principle involved. On the soundest ground of equity, as we think, the rights of the appellant followed the money from the land into the hands of Mrs. Smith. If this be true, then she must be regarded as holding it as the trustee of the appellant, and in no other capacity.

In equity, she has no right to the money. She does not, therefore, hold it in her own right. She is not the debtor of her husband, because, as between parties, a fraudulent conveyance is valid. She is not the debtor of her husband, because there was neither an implied nor an express promise to repay him, for she received the money as an actor in the corrupt scheme to defraud his creditors. There is, therefore, but one capacity in which she can hold, and that is as the trustee of the creditors. If she holds it in that capacity, then in that capacity she can be compelled to account. Reasoning solely on principle, this conclusion seems inevitable, and it is the conclusion which the authorities sustain.

In the case of *Clements v. Moore*, 6 Wall. 299, the supreme court of the United States held that "a purchaser of a stock of goods from a debtor confessedly insolvent, where the purchaser knows that the debtor's purpose is to hinder and delay a par-

ticular creditor, and also that if the debtor intended a fraud on his creditors generally, the purchase would necessarily be giving him facilities in that direction, is not responsible in equity (the sale being an open one, for a fair price, and followed by a change of possession) for any part of the consideration money which the debtor had applied to payment of his debts; but is responsible for any part which he has diverted from such payment."

The question was very fully and carefully discussed in *Ferguson v. Hillman*, 55 Wis. 181, and it was said: "The reason and justice of this rule are apparent when we consider the effect of any different rule upon the rights of the creditors. If the fraudulent grantee can be protected for the amount actually paid by him at the time of the fraudulent transfer, then this would happen: the fraudulent debtor could make a sale with intent to avoid the payment of his debts, take the money and leave the country, and the purchaser have knowledge that he intended to do so, and yet be protected for the money so paid and appropriated. A rule which would lead to such results cannot be tolerated by courts. The rule, as above stated, has been recognized and adopted by this as well as other courts: *Gardinier v. Otis*, 13 Wis. 460; *Stein v. Hermann*, 23 Id. 132; *Avery v. Johann*, 27 Id. 246; *Union Nat. Bank v. Warner*, 12 Hun, 306; *Briggs v. Merrill*, 58 Barb. 389; *Fullerton v. Viall*, 42 How. Pr. 294; *Goodhue v. Berrien*, 2 Sand. Ch. 630, 636. See also a long list of authorities upon this question cited by Mr. Bump in his work on fraudulent conveyances, page 198, note 2; May's Statutes of Elizabeth, 73, 74. If the fraudulent grantee in possession of the property of the debtor cannot be protected for the money or other consideration he may have given for the transfer, as against the creditors of such debtor, it would seem to follow as a necessary consequence that such grantee cannot be protected in the possession of the proceeds of such property received by him on a sale thereof. The property in the hands of the fraudulent purchaser is held by him in trust for the creditors of his fraudulent vendor, and when the property is converted into money, the money is impressed with the same trust. The original conveyance being void as to creditors, no title as to them ever passed to the grantee; and if he sells it and receives the money, he must hold the money for the benefit of the creditors. In equity, such money in the hands of the fraudulent grantee is held for the benefit of the creditors; and

although they may not be able to maintain an action at law for money had and received for their use, because they were never the owners of or had the title to the property which has been converted into such money, yet a court of equity, having all the parties interested before it, may make such order as to the application thereof as would be just."

In *Williamson v. Williams*, 11 Lea, 355, the court said: "It does appear that Wallace purchased fraudulently, and disposed of this land to aid his father-in-law in evading the payment of his debt, and sold to Terry with intent to avoid the complainant's claim. He swears he received the price of the property to the amount of seven thousand dollars. He shows he had received this money, and this fact is beyond question. Having deprived complainant of this land, and having obtained its price, he must be held responsible by reason of this fraudulent disposition of the land to be liable to the complainant's claim to the amount of the consideration received. This money stands for the land in his hands, and he cannot escape liability by having disposed of the land. It was so held in the case of *Marsh v. Powell*, Thompson's Tenn. Cas. 195, overruling the case of *Tubb v. Williams*, 7 Humph. 367, and the same principle also in *Coleman v. Satterfield*, 2 Head, 265. These cases have been several times affirmed since."

The point of the decision in *Fullerton v. Viall*, 42 How. Pr. 294, is, as stated in the head-notes, this: "If, before the judgment is obtained, the land be conveyed to a *bona fide* purchaser, the land is not subject to the lien of the judgment, but in equity, the creditor's lien attaches to the fund or proceeds received by the fraudulent grantee."

The court, in *Smith v. Sands*, 17 Neb. 498, gave the question careful consideration, and held the fraudulent grantee liable, saying, among other things: "The law requires the debtor to act in good faith with his creditors, and apply his property not exempt, if need be, to the payment of his debts. If he attempts to evade this duty, and for the purpose of hindering or defrauding his creditors by transferring his property to another without consideration, or with knowledge on the part of the grantee of the fraudulent intent, such grantee will take the property charged with the trust, and if he converts the property into money, he will be liable for its value, less any valid lien subsisting against it. And as the court administers both law and equity, it should adapt the relief to the

facts proved, and if need be, permit an amendment of the prayer of the petition for that purpose."

A similar principle was declared in *Murtha v. Curley*, 90 N. Y. 372, where it was said: "Under the circumstances of this case, judgment for the recovery of the precise sum of money claimed was the proper judgment; and the form of the judgment does not stamp this as a legal rather than an equitable action. A court of equity adapts its relief to the exigencies of the case in hand." At another place the court said: "Even if something was honestly due from Doyle to Curley on account of the fraud, Curley could not retain the property, or use its proceeds against a pursuing creditor."

Stronger still is the case of *Post v. Stiger*, 29 N. J. Eq. 554, where the wife sold the property fraudulently conveyed to her, and as a defense insisted that she had lost the money received in bad bargains; but the court denied the validity of this defense, saying: "She held the property as trustee of her husband's creditors, and dealt with it at her peril."

Mr. Bump says: "The grantee is construed to be a trustee for the creditors, and as such is responsible for all his acts in disposing of the property fraudulently conveyed to him. If he has parted with it, he must account for the value." Again he says: "A court of equity follows the proceeds of the property, and affords a remedy by turning the legal owner into a trustee for the benefit of creditors": Bump on Fraudulent Conveyances, 3d ed., 608, 609.

We feel quite sure, after a very careful search, that no case can be found, in which the question was fairly presented, where it has been held that the fraudulent vendee will not be held liable in equity. Counsel have cited us to none, and in our search we have found none.

We are careful to say that no case can be found where an appeal to a court of equity for relief against a fraudulent grantee in such a case as this was made in vain, for we are aware that there are cases holding that relief cannot be awarded by a court of law. Even on that question, however, there is much conflict, and the better reason, if not the greater number of cases, is in favor of the rule that for the tort an action will lie. But with that phase of the question, we are not now concerned.

The appeal for relief in this case was made to a court of equity, for all our courts are courts of equity. It matters not, under our code, what the form of the action, if the facts stated

sustain the theory on which the complaint proceeds, and entitle the plaintiff to the relief he seeks. Of this there can be no doubt on principle or authority: 1 Pomeroy's Eq. Jur., sec. 287; Pomeroy on Remedies, sec. 71; *Quarl v. Abbett*, 102 Ind. 233; 52 Am. Rep. 662.

The supreme court of Massachusetts has gone as far as any other court in ruling that an action at law cannot be maintained against a fraudulent grantee who converts the land conveyed to him, and appropriates the proceeds: *Bradley v. Fuller*, 118 Mass. 239. But as to suits in equity, the principle asserted by the decisions of that court are essentially different: *Hooper v. Hills*, 9 Pick. 435.

In *Tasker v. Moss*, 82 Ind. 62, the doctrine of the Massachusetts court, as to actions at law, seems to have been approved and applied to a case somewhat similar to the present. It is obvious that an important element was overlooked in that case, and that is, that under the code there is only one form of action, and that equitable relief will be granted whenever the facts well pleaded demand it. But we need not now express any opinion upon the merits of that decision; all that need be said is, that, granting it to be well decided, it does not apply here, for there, as it was expressly stated in the opinion, Thomas, the fraudulent grantee, "transferred the certificate to Miller, without receiving anything himself." Here the fraudulent grantee receives and holds the consideration received. The cases we have already referred to clearly show the principle upon which the courts proceed in such cases as this, and in showing this, show that on the plainest principles of equity the fraudulent grantee must account for what he has in his hands as the avails of the sale, or he must pay the value of what he retains. This principle is strikingly illustrated by the case of *Reeg v. Burnham*, 55 Mich. 39.

What we have said disposes of the questions presented by the first paragraph of the complaint, for the ultimate conclusion established is, that property subject to execution may be followed by creditors, although changed in kind, into the hands of one who occupies the position of a fraudulent grantee, and results in holding that paragraph to be good.

The second paragraph of the complaint alleges the indebtedness of Norman Smith to the appellant, alleges that he had no property subject to execution, alleges that his wife knew that fact, and that she knew of his intent to defraud his creditors; it alleges that he gave her eight hundred dollars for

which no consideration was yielded, and that she accepted it, knowing the corrupt purpose of her husband, and that she now holds it as trustee for his creditors, and has never accounted for it.

We think the principle we have stated applies to this paragraph of the complaint as well as to the first. Mrs. Smith received the money as trustee, and as such must account for it. If she had received a stock of goods from her husband pursuant to a corrupt scheme to defraud his creditors, she certainly could have been charged as trustee. The fact that she received one species of property rather than another can make no difference. The governing principle is the same, no matter what kind of property the fraudulent participant in the positive wrong receives. Mr. Pomeroy asserts, what is well known to be the law, that a fraudulent grantee takes as trustee, and says: "The lien upon the original articles will extend to the resulting fund or the substituted goods": 3 Pomeroy's Eq. Jur., sec. 1291. This is the underlying principle which everywhere prevails: May's Statutes of Elizabeth, 10; Wait on Fraudulent Conveyances, sec. 385.

The plaintiff is, therefore, right in proceeding, as he does, upon the theory that the fraudulent grantee is a trustee, and as such may be called upon to account for the trust funds. Damages in the form of compensation are always allowed in equity where no other form of relief is adequate: 1 Pomeroy's Eq. Jur., secs. 112, 237. This rule is often applied in cases against trustees for an accounting, and between partners, as well as in suits for specific performance where performance cannot be enforced: Pomeroy's Eq. Jur., secs. 181, 1410; 2 Story's Eq. Jur., 13th ed., 133.

As the question comes to us upon the facts alleged in the complaint, and as the only cause alleged for the demurrer is that the complaint does not state facts sufficient to constitute a cause of action, what we have said leads to the conclusion that the trial court erred in holding the complaint bad.

No error was committed in quashing the attachment proceedings, for the affidavit is insufficient. It is not shown in the affidavit, as the law requires, that the property sought to be reached was subject to execution: R. S. 1881, sec. 819. It is only property subject to execution that a creditor can assert a claim against. If the property is not subject to execution, the debtor has an absolute right of disposition, with which creditors cannot interfere. It is, therefore, no answer to the

objection to aver that the property was fraudulently conveyed, for if it was not subject to execution, creditors cannot be heard to aver that the debtor made a fraudulent disposition of it. Mr. Wait carries this doctrine to the extent of holding that the debtor may exchange property which is not exempt for property that is exempt, and hold the property thus obtained as against creditors: Wait on Fraudulent Conveyances, sec. 47. He is well supported by authority: *O'Donnell v. Segar*, 25 Mich. 367; *Randall v. Buffington*, 10 Cal. 491; *Morrison v. Abbott*, 27 Minn. 116; *McFarland v. Goodman*, 6 Biss. 111; *Vogler v. Montgomery*, 54 Mo. 577; *Cox v. Wilder*, 2 Dill. 45; *White v. Givens*, 29 La. Ann. 571; *Muller v. Inderreiden*, 79 Ill. 382; *Huginin v. Dewey*, 20 Iowa, 368. But the case before us is much clearer than those referred to.

Property exempt from execution is not subject to any claim of the creditor, but is absolutely free from all claims of creditors. No execution or other writ is a lien upon it. The creditor has no claim upon it in any form, and it is impossible to conceive any logical ground upon which property not subject to the claims of creditors can be held to have been fraudulently conveyed. If creditors have no interest in the property, it is inconceivable that they can justly claim that in disposing of it the debtor has been guilty of fraud. The whole doctrine of annulling fraudulent conveyances rests upon the ground that the creditor has a right to resort to the property, and where he has no such right it is impossible that a conveyance can be deemed fraudulent. Surely a man may do what he will with property which is his own, free from all claims of creditors. Our later decisions establish this doctrine, and it is the only doctrine defensible on principle: *Dumbould v. Rowley*, 113 Ind. 353; *Eiler v. Crull*, *supra*; *Barnard v. Brown*, 112 Id. 53; *Taylor v. Duesterberg*, 109 Id. 165; *Faurote v. Carr*, 108 Id. 123; *Burdge v. Bolin*, 106 Id. 175; 55 Am. Rep. 724.

The cases elsewhere declare and enforce this doctrine in its fullest extent: *Sannoner v. King*, 49 Ark. 299; *Bridgers v. Howell*, S. C., 1887; *Buckley v. Wheeler*, 52 Mich. 1; *Derby v. Weyrich*, 8 Neb. 174; 30 Am. Rep. 827; *Union Pacific R'y Co. v. Smersh*, Neb., 1888. In the case last cited the question arose in an attachment proceeding, and the court laid down the general principle as we declare it, and applied it as we apply it.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

NIBLACK, J., concurring. The rule undoubtedly is, that the law devotes all the property of a debtor, subject to execution, whether real or personal, to the payment of his debts. If, therefore, a debtor, instead of paying his debts with it, uses his personal property, subject to execution, upon the real estate of another, so that it becomes a part of such real estate, for the purpose of defrauding his creditors and preventing them from obtaining satisfaction of their demands out of his property with the knowledge and consent of the owner of the real estate, a judgment creditor may follow the property into the hands of the owner of the real estate thus benefited, and fasten his judgment upon such real estate to the extent of the debtor's fraudulent investment in it, where, by reason of the nature of the transaction, no debt, express or implied, is created between the debtor and the owner of the realty. This rule was very aptly formulated and restated in the case of *Isham v. Schafer*, 60 Barb. 317, and is approved in *Wait on Fraudulent Conveyances*, at section 26.

The rule in question was at first, however, only recognized as extending to the realty in which the fraudulent investment had been so made, and not, therefore, to the proceeds after its sale.

I agree, nevertheless, that the weight of modern authority favors the extension of the rule so as to enable a judgment creditor to reach the proceeds in the hands of the owner of such realty, after he has sold and conveyed it to an innocent purchaser. But one judgment creditor in such a case has no prior right or claim to such proceeds over another similarly situated. Where there are several claimants to the proceeds, a good case for a creditor's bill to adjust the equities between them is presented: *Hanna v. Aebker*, 84 Ind. 411; *Pomeroy's Eq. Jur.*, secs. 1413 et seq.; *Wait on Fraudulent Conveyances*, secs. 60, 68.

I think the cases of *Tasker v. Moss*, 82 Ind. 62, and *French v. Sheplor*, 83 Ind. 266, 43 Am. Rep. 67, were correctly decided upon the facts upon which they respectively rest.

With these additional remarks, I concur generally in the conclusion announced as above.

HUSBAND BY IMPROVING LANDS OF WIFE, AND EXPENDING MONEY and labor thereon voluntarily and without any agreement for repayment, gains no interest therein which his creditors can attach: See *Nance v. Nance*, ante, p. 378, and note.

CODES HAVE ABOLISHED DISTINCTION BETWEEN FORMS OF ACTIONS AT LAW AND SUITS IN EQUITY: See *Piercy v. Sabin*, 70 Am. Dec. 692, and note.

AFFIDAVIT IN ATTACHMENT MUST FOLLOW STATUTORY REQUIREMENTS: See note to *Friedenberg v. Pierson*, 79 Am. Dec. 165-172.

CONVEYANCE OF EXEMPT PROPERTY CANNOT BE FRAUDULENT AS AGAINST CREDITORS: See *Pike v. Miles*, 99 Am. Dec. 148; *Derby v. Weyrich*, 30 Am. Rep. 827; *Carhart v. Harshaw*, 30 Id. 752, and note. A gift from a husband to his wife of exempt property is not fraudulent against creditors: *Burge v. Bolin*, 55 Id. 724.

CORNELL v. GIBSON.

[114 INDIANA, 144.]

HUSBAND MAY PREFER HIS WIFE OVER OTHER CREDITORS. He has a clear and undoubted right to pay her a just debt at any time, in money or in property, and land so conveyed to her is free from the claim of any other of his creditors.

C. Clemans and A. C. Clemans, for the appellant.

J. S. Frazer and W. D. Frazer, for the appellee.

Howk, J. This was a suit by appellee, Gibson, plaintiff below, against William H. Cornell and the appellant, Sarah J. Cornell, his wife, as defendants. The objects of the suit were,—1. To recover the balance claimed to be due on a certain promissory note alleged to have been executed by defendant William H. Cornell to the order of the plaintiff herein, and to that end (2) to subject to sale certain lots particularly described in the town of Pierceton, in Kosciusko County.

In his complaint plaintiff averred, among other things, that after defendant William H. Cornell had executed the note sued on, he purchased with his own funds the lots aforesaid in such town of Pierceton, and, with his own funds, made lasting and valuable improvements thereon; that when he so purchased such town lots, for the purpose of cheating, defrauding, hindering, and delaying his creditors, and particularly the plaintiff, such defendant caused such lots to be conveyed to his co-defendant, Sarah J. Cornell, who was then and since his wife, and who accepted the conveyance of such real estate with knowledge of the aforesaid fraudulent purposes of her husband and co-defendant, and did not pay any consideration therefor; and that defendant William H. Cornell had not, at the commencement of this suit, nor at the time such conveyance was so made to his co-defendant, any property in his own

name subject to execution sufficient to pay his debts. Wherefore, etc.

The cause was put at issue and tried by a jury, and a verdict was returned finding for plaintiff against both defendants, and assessing his damages against defendant William H. Cornell in the sum of \$662.07. Over the separate motion of defendant Sarah J. Cornell for a new trial herein, the court rendered judgment against defendant William H. Cornell for the damages assessed as aforesaid and the costs of suit, and decreed the sale of the aforesaid town lots to satisfy such judgment.

Defendant Sarah J. Cornell alone has appealed from such judgment and decree, and has here assigned as error the overruling of her motion for a new trial.

Appellant's counsel first contend that, as against her, the verdict of the jury was not sustained by sufficient evidence, and was contrary to law. We are of opinion that this objection to the verdict is well taken, and must be sustained. As between appellant, Sarah J. Cornell, and the plaintiff herein, he had the burden of the issues. He alleged, and it devolved upon him to prove by a fair preponderance of the evidence, that when defendant William H. Cornell purchased the aforesaid lots in the town of Pierceton, he, such defendant, for the purpose of cheating, defrauding, hindering, and delaying his creditors, and particularly the plaintiff herein, caused such lots to be conveyed to his co-defendant, Sarah J. Cornell, then and since his wife. Yet plaintiff introduced no evidence whatever proving or tending to prove that, when such lots were so purchased as aforesaid, the purchaser, William H. Cornell, caused the aforesaid lots to be conveyed to his wife, Sarah J. Cornell, for the purpose of cheating, defrauding, hindering, or delaying any of his creditors, and certainly not the plaintiff herein. Not only so, but the uncontradicted evidence appearing in the record clearly proved, as it seems to us, that William H. Cornell caused such lots to be conveyed to his wife, Sarah J. Cornell, and lasting and valuable improvements to be made thereon, in the execution and fulfillment of a valid agreement entered into between them some time before the date of the note in suit herein, whereby he agreed that he would procure her a house and lot in consideration of the sum of eight hundred dollars, which she had loaned him in 1873, and which he had agreed to pay back to her in that way. The conveyance of the lots described in plaintiff's complaint herein, which

defendant William H. Cornell caused to be made to his wife, Sarah J. Cornell, was dated on the twenty-third day of April, 1880, and was executed upon the consideration of \$250, as expressed therein. Both William H. and Sarah J. Cornell were witnesses on the trial of this cause; he testified that he did not cause the lots aforesaid to be conveyed to his wife for the fraudulent purpose alleged in plaintiff's complaint; and she testified that she accepted the conveyance of such lots without any knowledge whatever of any such fraudulent purpose on the part of her said husband; and they both concurred in testifying that he had caused the lots aforesaid to be conveyed to her in part payment of the sum of money she had loaned him as aforesaid.

Upon these points, the evidence of defendants, William H. and Sarah J. Cornell, was not contradicted by any other evidence appearing in the record, and it shows very clearly, we think, that the conveyance of the town lots, described in plaintiff's complaint, was not fraudulent, and gave her good title to such lots, free from the claim of plaintiff herein or of any other creditor of her said husband. It is shown by the evidence that defendant William H. Cornell was justly indebted to his wife, Sarah J. Cornell, as well as to the plaintiff herein, and that in purchasing the lots aforesaid and causing them to be conveyed to his wife, and in making lasting and valuable improvements thereon, with his own funds, he was simply giving a preference to his wife over his other creditors, in the application of his funds to the payment of his debts. The preference thus given was neither fraudulent nor illegal. The husband had a clear and undoubted right to pay the debt to his wife at any time, in money or in property, and to prefer his wife over other creditors in so doing. "She was the creditor of her husband for the money loaned, and as much entitled to payment as if she had been a *feme sole*": *Kyger v. F. Hull Skirt Co.*, 34 Ind. 249; *Brookville Nat. Bank v. Kimble*, 76 Id. 195; *Sedgwick v. Tucker*, 90 Id. 271; *Dice v. Irvin*, 110 Id. 561, and authorities cited; *Hill v. Bowman*, 35 Mich. 191; *Jordan v. White*, 38 Id. 253.

For the reasons given, we are of opinion that the verdict of the jury, as against appellant, Sarah J. Cornell, is not sustained by, but is in direct conflict with, the evidence in the record, and that, for this cause, her separate motion for a new trial ought to have been granted. Some other causes assigned for a new trial are discussed by counsel, but these we need not

and do not now consider. It was error to overrule the separate motion of appellant, Sarah J. Cornell, for a new trial herein.

The judgment against defendant Sarah J. Cornell is reversed, with costs, and the cause is remanded, with instructions to sustain her motion for a new trial, and for further proceedings in accordance with this opinion.

HUSBAND MAY PREFER HIS WIFE OVER OTHER CREDITORS: See note to *Wilder v. Brooks*, 88 Am. Dec. 55, 56.

BARTON v. THE ENTERPRISE LOAN AND BUILDING ASSOCIATION.

[114 INDIANA, 226.]

BUILDING ASSOCIATION CANNOT DISSOLVE ITSELF BY ITS OWN RESOLUTION without the consent of all the share-holders, where the articles of association do not authorize the corporation to close its existence short of eight years unless all stock is redeemed at its value, and that period has not elapsed nor the stock been all redeemed.

RECEIVER OF BUILDING ASSOCIATION WILL NOT BE APPOINTED where there are no assets to be distributed, and where all the share-holders agreed that advancements of money made to members, where they took the same and paid all dues and interest, should be theirs absolutely, and if they agreed to take the money advanced to them in full for their stock, they should not be required to pay back money advanced, then mortgages taken for money so advanced cannot be enforced, and there are no assets to be distributed.

J. T. Alexander, J. M. Hatfield, W. G. Sayre, and M. Good, for the appellant.

A. Hess, C. Cowgill, H. B. Shiveley, and C. E. Cowgill, for the appellee.

ELLIOTT, J. The appellee is an incorporated Building, Loan Fund, and Savings Association, existing under articles of association filed on the thirty-first day of July, 1879. Article 4 of the organic instrument provides that "this association shall continue in operation eight years, unless the funds of the association shall be sufficient to pay all its debts, and to redeem all its stock in a shorter time." One thousand shares of stock were issued, and all redeemed before July 18, 1887, except thirty-eight. The appellee was the owner of one of these shares. On the eighteenth day of July, 1887, a resolution was passed declaring the corporation dissolved. This

resolution recites that there was, at that time, \$399.83 in the hands of the treasurer, and it made provision for dividing that sum among the thirty-eight share-holders whose stock had not been redeemed. These share-holders had made ninety-six monthly payments of one dollar on each share. Under the arrangement proposed by the resolution, the appellant would receive \$10.53 as his share of the assets of the corporation, while the holders of the redeemed shares, those who had received loans on their stock, would each receive \$142.67.

The appellant's position is, that the resolution declaring the corporation dissolved was nugatory, and that it must continue in existence until its business is wound up as the statute provides.

We concur with the appellant in the opinion that the article we have copied from the articles of association did not authorize the corporation to close its existence short of eight years, unless all stock was redeemed at its value. We think it clear that the corporation could not dissolve itself by its own resolution until that period had expired, unless all the share-holders consented to the dissolution. The charter of the corporation is embodied in the articles of association, and those articles cannot be changed without the unanimous consent of share-holders who have vested rights: *Bergman v. St. Paul etc. Assoc.*, 29 Minn. 275; Endlich Law of Building Associations, sec. 479. We conclude without hesitation that the resolution of July 18th was not effective.

A further question remains: Does the complaint entitle the appellant to a receiver? If there are no assets except those which it is proposed to distribute to the appellant and the other thirty-seven share-holders to whom money has not been advanced, a case is not made for the appointment of a receiver. Whether there are such assets depends upon the character of the mortgages taken for money advanced to share-holders. If the mortgages are regarded as made to secure loans which those share-holders can be compelled to pay, then there are assets which should be made available and distributed. If they are not loans, and not collectible, then there are no assets to be distributed, and there is no necessity for appointing a receiver. To determine this question, it is necessary to examine the statute and the plan upon which the business was conducted under the by-laws of the corporation. The statute provides that loans may be made to share-holders at a rate of interest not exceeding ten per centum per annum;

that the money shall be offered in open meeting, and awarded to the share-holder bidding the highest premium. It also provides that the by-laws shall prescribe the manner of awarding loans, and the rate of interest: R. S. 1881, sec. 3416.

Under the by-laws adopted, this corporation, from the time of its organization, as the verified answer avers, pursued this plan: at each monthly meeting "the money in the treasury was put up at auction with respect to preference in advancements, and whoever at such auction was willing to make the greatest discount to the association, or to take at the time the least amount of money per share for the interest that otherwise he might have at the end of its term in the association's assets, — he to continue to the end of the association in paying the prescribed dues and interest upon his shares of stock on the sum recoverable in full of each future payment of interest, as authorized by sections 1 and 2 of article 14, as amended, of the by-laws, — was to receive such money. The amount so paid, provided he kept up his dues, met such assessments as aforesaid, or paid out as provided for in sections 1 and 2, as amended, of article 14 of the by-laws, being his absolutely, and he surrendering in consideration thereof the interest that otherwise he might have received in the said association assets."

It is also alleged that all the stockholders agreed to this arrangement.

This answer is by no means a model pleading, for it is confused and obscure, but we think it shows with reasonable certainty that the share-holders all agreed that the members who took the money and paid dues and interest, and agreed to take the money advanced to them in full for their stock, should not be required to pay back the money advanced. Upon this theory, it must be held that there were no assets for distribution, except the money in the treasury which the association proposed to distribute: *Lister v. Log Cabin etc. Assoc.*, 38 Md. 115; *Endlich's Law of Building Associations*, secs. 150, note, 440, 492.

We do not decide what would be the rule if no such agreement had been made as the answer alleges was made; nor do we decide what would be the effect of such an agreement not acquiesced in by all the share-holders. We decide the case made by the record, and do not go beyond it. All that the record requires us to decide is, that as there were no assets, the appellant was not entitled to have a receiver appointed:

Cason v. Seldner, 77 Va. 293, and cases cited; *Hagerman v. Ohio Building etc. Assoc.*, 25 Ohio St. 186.

Judgment affirmed.

DISSOLUTION OF BUILDING AND LOAN ASSOCIATIONS is considered in the note upon the law concerning such associations to *Robertson v. Homestead Ass'n*, 69 Am. Dec. 165, 166.

EADS v. RETHERFORD.

[114 INDIANA, 273.]

TAX LIEN IS NOT DESTROYED NOR TAXES INVALIDATED by the method in which the owner's name is entered on the tax duplicate, especially where such error or inaccuracy is slight.

TENANT IN COMMON MAY COMPEL CONTRIBUTION FROM CO-TENANTS FOR THEIR SHARE OF TAXES rightfully paid by him upon an entire tract of land which had descended to all as heirs.

A. Ellison and H. D. Thompson, for the appellant.

F. A. Walker and E. P. Schlater, for the appellees.

ELLIOTT, J. The appellant alleges in his complaint that, in the year 1865, Burkett Eads died, the owner of the real estate in controversy; that he left as his heirs the appellant and Letha A. Retherford; that, in the year 1874, Letha A. Retherford died, the owner of one half the real estate of which Burkett Eads had died seised; that the land was entered on the duplicate for taxation in the name of Burkett Eads's heirs; that partition of the land has never been made; that the appellant, since 1867, has been compelled to pay taxes on the entire tract of land, and to redeem from tax sales; that the amount paid by him is \$172.55. Prayer that the plaintiff be adjudged to have a lien on the land for the taxes and interest, and that his lien be foreclosed, and judgment awarded him.

The taxes were not invalidated by the method in which the owner's name was entered on the duplicate. An error in listing the taxes does not destroy the lien nor relieve the owner from paying them. Persons who own land are chargeable with knowledge that it is liable to taxation; and if they neglect to pay what they know it is their duty to pay, they cannot escape liability on the ground of some error or inaccuracy in naming the owners; at all events, not upon such an inaccuracy as that shown by the complaint. The authorities settle

this question: *Noble v. City of Indianapolis*, 16 Ind. 506, and cases cited; *Sloan v. Sewell*, 81 Id. 180; *Jenkins v. Rice*, 84 Id. 342; *Carr v. State*, 103 Id. 548, and cases cited.

There was therefore a valid lien against the land, which the appellant, as the owner of an undivided part of it, had a right to pay; and the only question is, Can he rightfully call upon his co-tenants to contribute? The question here is not, as counsel suppose, whether one tenant in common can acquire a title through a sale of the land owned in common for taxes, but whether he can compel his co-tenants to pay their share of the taxes. The case of *Page v. Webster*, 8 Mich. 263, 77 Am. Dec. 446, is therefore not in point.

The general rule undoubtedly is, that one tenant who has paid an encumbrance may compel contribution from his co-tenants: 1 Story's Eq. Jur., sec. 505; Freeman on Co-tenancy, secs. 322, 512. This is a sound and salutary rule, and we cannot conceive why it should not apply to this case, for the taxes were a burden on the land from which it could be relieved only by payment. Judge Cooley does apply the general rule to such cases as this, for he says: "Each tenant in common is bound to pay the tax on his own interest; but if one is compelled to pay upon all, he may charge the interest of his co-tenant with the proportionate part which such co-tenant should have paid": Cooley on Taxation, 2d ed., 467.

It may perhaps be true that, under our statute, the appellant might have elected to pay the taxes on his undivided half of the land, but he was not bound to pursue this course. He had a right to pay all the taxes, and prevent a sale of any part of the land. Taking all the sections of the statute together, the reasonable construction is, that one to whom land descends jointly with other heirs may either pay the taxes due on his undivided interest in the land, or he may pay all the taxes and enforce contribution. Either this construction must be adopted, or many clear provisions of the statute be overthrown. Section 6321, Revised Statutes 1881, may be taken as an example of other similar provisions scattered through our voluminous and confused revenue laws. In that section it is written: "Each heir or devisee shall be liable for the whole of such tax, and shall have a right to recover of the other heirs or devisees their respective proportions thereof, when paid by him, and interest thereon; and the lien for the proportion of taxes paid on the different shares of the land shall vest in the person who pays the taxes." It is very clear,

therefore, that neither the statute nor the general rule of law gives any support to the appellee's claim that the appellant is a mere volunteer.

Whether the complaint does or does not claim too much interest, or whether it does or does not claim for taxes barred by the statute of limitations, are questions not presented; for, as the complaint entitles the plaintiff to some part of the relief prayed, and in the form it is demanded, it is sufficient to repel a demurrer: *Bayless v. Glenn*, 72 Ind. 5.

Judgment reversed.

IRREGULARITIES IN ASSESSMENTS GENERALLY: See note to *People v. Seymour*, 76 Am. Dec. 527-534.

CONTRIBUTION BETWEEN CO-TENANTS FOR TAXES PAID: Note to *Curl v. Watson*, 95 Am. Dec. 767.

HENRY v. HEEB.

[114 INDIANA, 275.]

THERE CAN BE NO RATIFICATION OF FORGED PROMISSORY NOTE which can be held binding upon person whose name was forged, in the absence of an estoppel *in pais*, or without a new consideration for the promise.

RATIFICATION. — IF ONE WHO ASSUMES TO ACT AS AGENT SIGNS ANOTHER PARTY'S NAME under pretense or color of authority, ratification, understandingly, either by an express promise to pay or by accepting a chattel mortgage as indemnity, would be equivalent to previous authority.

RATIFICATION WHICH THE LAW INTERDICTS RELATES ONLY TO SUCH ACTS as clearly appear to have been done in violation of a criminal statute, the motive of the ratifying party being presumably the concealment of the crime or the suppression of its prosecution.

UNAUTHORIZED SIGNATURE TO NOTE. — WHERE THE ACT RATIFIED IS OF AN AMBIGUOUS CHARACTER, and may as well be attributed to a mistaken assumption of authority as to a purpose to commit a crime, public policy does not forbid the adoption or ratification of the act; nor can it be said to be without consideration where indemnity has been accepted.

R. Conner, H. L. Frost, and J. I. Little, for the appellants.

J. F. McKee and D. W. McKee, for the appellee.

MITCHELL, C. J. This was a suit by Nicholas Heeb against Henry Heeb, John F. Schonert, and James D. Henry, to recover the amount of two promissory notes signed by Heeb and Schonert, who were partners, as principals, and by James D. Henry as surety.

The controversy is between the plaintiff and the appellant Henry, and relates exclusively to the note described in the

second paragraph of the complaint, the execution of which Henry denied under oath. To the denial of the latter, the plaintiff replied, in substance, that the defendant, after having obtained full knowledge that the plaintiff held the note in controversy, ratified and confirmed the same, and promised to pay it, and accepted a chattel mortgage covering the partnership property of Heeb and Schonert, the principal debtors, as indemnity against any liability which might exist on account of his having become surety on the note. This was held to be a sufficient reply.

While there was much evidence tending to prove that the signature of Henry, as it appeared on the note, was his genuine signature, there was also evidence tending to prove that it was not genuine. The extent to which the evidence went in that regard was to affirm the genuineness of the signature on the one hand, and to deny it on the other. There was no evidence tending to incriminate any particular person, or directly pointing to any one as having perpetrated the crime of forgery in respect to the appellant's signature. Besides, there was evidence which tended to show that one of the principal makers of the note had, with the appellant's consent, filled out blank notes, which had been previously signed by the latter as surety, and upon which the firm subsequently obtained loans of money.

The appellant testified that he neither signed nor authorized any one to sign his name to the note, "to the best of his knowledge."

There was some evidence tending to show that Henry recognized the validity of the note, and his liability to pay it, and that he had knowledge of the execution of a chattel mortgage by Schonert in the firm name to secure him and other creditors of the firm, and that the note in suit was one of the claims mentioned in the mortgage as having been signed by Henry as surety for Heeb and Schonert.

Relevant to the issue made by the plea of *non est factum*, and the reply thereto, and to the evidence pertaining to that feature of the case, the court instructed the jury, in substance, that if the appellant, after having obtained full knowledge upon the subject of whether or not he executed the note, ratified and confirmed the same, and promised to pay it, he would be liable for the amount thereof. The judgment was favorable to the plaintiff below. The ruling on the demurrer to the reply, and the giving the above instruction, are com-

plained of as causes for a reversal of the judgment. The reply and the instruction present substantially the same question.

It does not appear that the promise of the appellant induced the plaintiff to change his position in any manner, or that in reliance thereon he surrendered any right or benefit whatever. There is, therefore, no element of estoppel in the case as presented either in the pleading or in the instruction of the court.

The appellant contends that a person whose name has been forged to a note cannot ratify or adopt the criminal act, so as to become bound, unless facts have intervened which create an estoppel, and preclude him from setting up as a defense that his signature is not genuine. There appears to be an irreconcilable conflict in the decisions of the courts of last resort on this question. Thus in *Wellington v. Jackson*, 121 Mass. 157, the supreme judicial court of Massachusetts, following its earlier decisions, held that one whose signature had been forged to a promissory note, who yet, with knowledge of all the circumstances, and intending to be bound by it, acknowledged the signature, and thus assumed the note as his own, was bound to the same extent as if the note had been signed by him originally, without regard to whether or not his acknowledgment amounted to an estoppel *in pais*: *Greenfield Bank v. Crafts*, 4 Allen, 447; *Bartlett v. Tucker*, 104 Mass. 336 (341); 6 Am. Rep. 240. To the same effect is *Hefner v. Vandolah*, 62 Ill. 483; 14 Am. Rep. 106; *Fitzpatrick v. School Commissioners*, 7 Humph. 224; 46 Am. Dec. 76.

There are other cases which, while seeming to lend support to the doctrine that a forged signature may be ratified, nevertheless turn upon the proposition that the holder of the note had in some way acted in reliance upon the promise or admission of the person whose name appeared on the note, or that the latter had received or participated in the consideration for which the note had been given, and was therefore estopped to deny the genuineness of his signature. Still other decisions depend upon principles which distinguish them from cases involving the doctrine of ratification or adoption of forged instruments purely: *Casco Bank v. Keene*, 53 Me. 103; *Forsyth v. Day*, 46 Id. 176; *Corser v. Paul*, 41 N. H. 24; 77 Am. Dec. 753; *Woodruff v. Munroe*, 33 Md. 146; *Union Bank v. Middlebrook*, 33 Conn. 95; *Livings v. Wiler*, 32 Ill. 387; *Commercial Bank v. Warren*, 15 N. Y. 577; *Crout v. De Wolf*, 1 R. I. 393;

McKenzie v. British Linen Co., L. R. 6 App. Cas. 82; *Forsythe v. Banta*, 5 Bush, 548.

It is a well-established rule of law that if one, not assuming to act for himself, does an act for or in the name of another upon an assumption of authority to act as the agent of the latter, even though without any precedent authority whatever, if the person in whose name the act was performed subsequently ratifies or adopts what has been so done, the ratification relates back and supplies original authority to do the act. In such a case the principal is bound to the same extent as if the act had been done in the first instance by his previous authority, and this is so whether the act be detrimental to the principal or to his advantage, or whether it be founded in tort or contract. The reason is, that there was an open assumption to act as the agent of the party who subsequently adopted the act. The agency having been knowingly ratified, the ratification becomes equivalent to original authority: *Wilson v. Tuman*, 6 Man. & G. 236; *Smith v. Tramel*, 68 Iowa, 488. So, if a contract be voidable on account of fraud practiced on one party, or if for any reason it might be avoided, yet if the party having the right to avoid the contract, being fully informed, deliberately confirms or ratifies it, even though this be done without a new consideration, and after acts have been done which would have released the person affected, the party thus ratifying is thereby precluded from obtaining the relief he otherwise might have had: *Williams v. Boyd*, 75 Ind. 286.

The ratification or adoption of a forged instrument, or of a contract which is prohibited by law, or made in violation of a criminal statute, involves altogether different principles. One who commits the crime of forgery by signing the name of another to a promissory note does not assume to act as the agent of the person whose name is forged. Upon principle, there would seem to be no room to apply the doctrine of ratification or adoption of the act in such a case. Where the act done constitutes a crime, and is committed without any pretense of authority, it is difficult to understand how one who is in a sense the victim of the criminal act may adopt or ratify it, so as to become bound by a contract to which he is to all intents and purposes a stranger, and which as to him was conceived in a crime and is totally without consideration. As has been well said, it is impossible in such a case to attribute any motive to the ratifying party but that of concealing the crime and suppressing the prosecution: "for why should a man pay

money without consideration when he himself had been wronged, unless constrained by a desire to shield the guilty party?"

The distinction made in many well-considered cases seems to be this: Where the act of signing constitutes the crime of forgery, while the person whose name has been forged may be estopped by his admissions, upon which others may have changed their relations from pleading the truth of the matter to their detriment, the act from which the crime springs cannot, upon considerations of public policy, be ratified without a new consideration to support it: *Shisler v. Vandike*, 92 Pa. St. 447; 37 Am. Rep. 702; *McHugh v. County of Schuylkill*, 67 Pa. St. 391; *Workman v. Wright*, 33 Ohio St. 405; 31 Am. Rep. 546, and note; *Owsley v. Philips*, 78 Ky. 517; *Brooke v. Hook*, 24 L. T. 34; 2 Daniel on Negotiable Instruments, 1351, 1353; 2 Randolph on Commercial Paper, sec. 629.

In a case of a known or conceded forgery, we are unable to discover any principle upon which a subsequent promise by the person whose name was forged can be held binding in the absence of an estoppel *in pais*, or without a new consideration for the promise: *Workman v. Wright*, *supra*; *Owsley v. Philips*, *supra*.

Notwithstanding the elaborate argument of counsel, our conclusion is, that neither the reply nor the instruction as applied to the evidence in the case before us presents the question of the ratification of a forged instrument.

The case was contested upon the one side on the theory that the signature to the note was the appellant's genuine signature. There was no question of forgery involved in the case. There was no evidence pointing to the crime of forgery on the part of any one. The question was, whether the note had been signed by the appellant, or by some one duly authorized by him. For anything that appears either in the reply or in the evidence, it may as well be assumed, if the appellant's name was not signed by himself, that it was signed by another under pretense of authority.

As we have seen, if the appellant's name was signed by some one who assumed to act as his agent, or under pretense or color of authority, ratification, understandingly, either by an express promise to pay, or by accepting a chattel mortgage as indemnity, would be equivalent to previous authority.

The ratification which the law interdicts relates only to such acts as clearly appear to have been done in violation of a crim-

inal statute, the motive of the ratifying party being presumably the concealment of the crime or the suppression of its prosecution. Where, however, as in the present case, the act ratified is of an ambiguous character, and may as well be attributed to a mistaken assumption of authority as to a purpose to commit a crime, public policy does not forbid the adoption or ratification of the act; nor can it be said to be without consideration, especially where, as in the present case, indemnity has been accepted.

These conclusions lead to an affirmance of the judgment. Judgment affirmed, with costs.

POWER OF PRINCIPAL TO RATIFY CRIMINAL ACT. — There are certain acts which cannot be legally delegated to an agent to perform, such as acts to be done in violation of law, or which would contravene public policy, and which would amount to crimes against the state. Therefore, since such acts cannot be lawfully delegated, it necessarily and logically follows that they cannot, as such illegal acts, be ratified: *Greenhood on Public Policy*, 210, rule 197; *Mechem on Agency*, ed. 1889, secs. 20 et seq., 115; and this rule is strictly in keeping with the decision in the principal case. But in the application of any general rule to the specific crime of forgery, there is an apparently irreconcilable conflict of authority; we say apparently, because there are comparatively few cases. Those cited in the principal case, in the note to *Workman v. Wright*, 31 Am. Rep. 549, and in this note, constitute nearly, if not all, the important cases of value upon this subject, in which the exact question indicated has been considered; and in addition, this apparent conflict is confined to a much more limited number of cases, viz., to those in which there is no argument of the principles involved, but simply bare *dicta*. Outside of these last, there is no irreconcilable conflict as to the law. In the several states, where there has been a sufficient argument of the question to discover what principles the court has considered to have been involved, we find the weight of authority to be that one whose name has been forged can ratify the act so as to be holden: *Hefner v. Vandolah*, 62 Ill. 483; 14 Am. Rep. 106; *Commercial Bank v. Warren*, 15 N. Y. 577; *Cravenes v. Gillilan*, 63 Mo. 28; *Dow's Ex'r v. Spenny's Ex'r*, 29 Id. 386; *Harper v. Devene*, 10 La. Ann. 724; *Wellington v. Jackson*, 121 Mass. 157; *Forsythe v. Bonta*, 5 Bush, 547; and also in other states, whose decisions are hereinafter specially noted.

In England, *Brooke v. Hook*, L. R. 6 Ex. 89, 31 Am. Rep. 550, which is a leading case and decides that a forgery is incapable of ratification, has not, so far as we can ascertain, been directly overruled; although in *McKenzie v. British Linen Co.*, 6 L. R. App. C. 82, while the court refused to hold that there was a ratification where the holder of forged paper had not been induced to alter his position by reason of the silence or admissions of the party whose signature was forged, yet it held that a person could not, when he knew that his signature was forged, stand by and permit a bank to alter its position to its injury; but the court (*Id.* 99) says: "I wish to guard against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defense for the forger against a criminal

charge; I do not think he could. But if the person whose name was used without authority chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just as if he had originally authorized it. It is quite immaterial whether this ratification was made to a person who seeks to avail himself of it or to another." Dr. Wharton, in his work on agency, section 71, while declaring the rule that a principal may ratify a forgery of his name, says: "I state this conclusion with some hesitation"; and refers to *Brooke v. Hook*, *supra*, as affording a ground for his doubts; but in support of the rule, that learned writer in the same section adds the following: "But what is a forgery? No doubt if it is patent that when a signature is knowingly fabricated with intent to defraud, and this is found by the jury, a court must judicially pronounce the case to be forgery. But how can this be predicated of a case in which the person whose signature is said to be forged adopts such signature as his own? In such a case, would it be possible to exclude the doubt whether the supposed forger may not have believed that he was or would be recognized as authorized to sign, and if so believing, could he be held guilty of forgery? And in any view, can we preclude a party from saying, 'My name was signed with the intention of benefiting me. I adopt the act'?"

In *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106, where the defendant's name was attached to a note as surety without his authority, but afterwards it was shown to him and he admitted the signature to be his, it was held that he was estopped from denying the execution of the note; and the court said in that case that the same rule should apply "as in the case of the adoption or ratification of an ordinary act of assumed agency; that the form of the signature not bearing any indication of the fact of its being made by another hand does not prevent the person whose name is placed on the note from being legally holden, upon proof that the signature was previously authorized, or subsequently adopted." This case was distinguished from that where the admission is made under a mistaken belief that the signature was genuine, since here the acts and admissions were made "after a careful examination of the note and time taken for consideration, with full knowledge," by the defendant, that the signature was not in his handwriting. But the court limited the question in the case to the only one of whether the defendant ratified or adopted his forged signature on the note, although the point was raised by counsel that the admissions of defendant must be of such a character as to constitute an estoppel *in pais*, having the element of actual damage from delay occasioned by the misleading character of his acts. *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546, is seemingly opposed to the last case, and decides that a mere promise to pay a forged note, when such promise is given by the supposed maker of the note without any new consideration, and after the promisee has acquired the note, is not binding. The distinction is apparent, however, between these two cases; in the former, there were circumstances which the court declared estopped the defendant; in the latter, in addition to the fact that there were "no circumstances to create an estoppel, there was no consideration for the promise," since the owner of the note had in no way changed his *status* by reason of the defendant's admissions; and it also appeared that the defendant "had signed a note, and when the one in suit was shown him said he would pay it, supposing it to be the one he had signed," thereby coming within the very distinction made in the former case as to admissions made under a mistaken belief. These cases, therefore, do not conflict; but are both, so far as they go, reconcilable with the majority of cases upon the main question considered in this note.

A distinction is made in the principal case between the ratification of a forged instrument and the ratification of the act of an agent; a further distinction is also made between cases of forgery where mere estoppel arises by reason of others having changed their position on account of the admissions and those cases of a ratification of the act itself from which the crime springs, asserting that in the latter case there must be a new consideration; or in brief, that where there is a known forgery, there must be either an estoppel *in pais* or a new consideration, to make a subsequent promise binding upon the person whose name is forged. This is in keeping with what is said in *Mechem on Agency*, ed. 1889, sec. 116, which is as follows: "But whatever may be regarded as the true rule in the abstract, it is certain that the principal may, upon discovery of the forgery, so conduct himself as by permitting the paper to be taken upon the strength of his assertion as to its genuineness, or by inducing the holder to change his position, or intermit some remedial proceeding upon assurance of its validity or a promise of protection, or generally, by remaining silent as to its invalidity, when in equity and good conscience he ought to have spoken, as to estop himself from asserting that it is not binding upon him."

This question resolves itself, then, into civil undertakings and undertakings to suppress the crime. The latter would, in all cases, be void: *Mechem on Agency*, ed. 1889, sec. 116; *Sisler v. Vandike*, 92 Pa. St. 447; 37 Am. Rep. 702. The former, or civil undertakings, resolve themselves into cases, — 1. Where the act done is a mere unauthorized act, which is not illegal and against public policy, or which is among those acts which could have been delegated in the first place; 2. Where, as is stated in the principal case, there has been an estoppel *in pais* against the principal, or a new consideration, for in both these instances there may, by the weight of American authority, be a ratification: *Mechem on Agency*, ed. 1889, sec. 116; *Corser v. Paul*, 41 N. H. 24, and cases *ante*. So where there is a forged indorsement of the payee's title, a declaration by the maker that the note is right upon its being presented to him, after it was transferred to a subsequent indorsee, does not estop the maker from setting up the defense of forgery of the indorsement; but it would be otherwise if the declaration were made before the transfer, and such indorsee should take the note upon the faith of such declaration: *Lancaster v. Baltzell*, 7 Gill & J. 468; 28 Am. Dec. 233. But there is "no estoppel, unless the plaintiff changed his position for the worse in just reliance upon what the defendant said": *Smith v. Tramel*, 68 Iowa, 488, 490. Though where the defendant's name had been forged as surety on a note, and on being shown the note by the owner he admitted that the signature was genuine and promised to pay the note, supposing that he had signed it, and the owner was thus induced to forbear suit until the maker became insolvent, it was held that the defendant was estopped from setting up that his signature was forged: *Rudd v. Matthews*, 79 Ky. 479; and where one, assuming to act as agent for a mercantile house of which he was a clerk, signed a note with the firm's name, adding "p. pw. E. A. Searle,"—his own name, — and it was thereafter shown to the defendant, who was a member of the firm, who said it was all right and he would have it to pay, and in addition took the note and corrected its date, this was held a ratification of the signature of the note: *Harper v. Devene*, 10 La. Ann. 724. So, in *Corser v. Paul*, 41 N. H. 24, it was held that where the holder of a note has been led to alter his position, to his injury, by the statement that a forged signature is genuine, then the silence of a party to whom a note was shown which purported to have his signature, and accompanied with a request to pay it,

would estop such party from denying that the signature was his. But the ratification, to be binding, must, in this as in other cases of ratification, be made with full knowledge of the facts: *Hefner v. Vandolah*, 62 Ill. 483; 14 Am. Rep. 106. The cases of *Cravens v. Gillilan*, 63 Mo. 28, and *First National Bank of Trenton v. Gay*, 63 Id. 33, decide that if one's name has without his authority been placed upon a note, he may ratify the same, and that no new or independent consideration is necessary; but there was no evidence of bad faith in either of the cases; they are therefore to be distinguished from a case where the ratifier's name has been forged; and the court (Id. 40) declares that the Pennsylvania case of *McHugh v. County*, 67 Pa. St. 391, and cases therein cited, have no application, since they only hold that there can be no ratification without a new consideration, where the original act was *mala fide*; and in *Wellington v. Jackson*, 121 Mass. 157, cited in the principal case, it is declared that there may be such ratification of forged paper, although the principal's admissions do not amount to an estoppel *in pais*; the question of new consideration was not considered.

LANE v. SCHLEMMER.

[114 INDIANA, 296.]

WHERE AVERMENT IN COMPLAINT TO QUIET TITLE IS THAT PLAINTIFF OWNS THE FEE of the land in controversy, but does not specifically set forth his title, the law declares that he owns the entire estate absolutely.

MARRIED WOMAN IS ESTOPPED FROM DENYING HER POSITIVE REPRESENTATIONS MADE TO A MORTGAGEE, who, acting in good faith, and having no knowledge that the facts stated are untrue, is induced by those representations to take a mortgage upon her real estate.

DURESS. — AS AGAINST BONA FIDE INDORSEE OF NOTE AND HOLDER OF MORTGAGE, MARRIED WOMAN IS ESTOPPED from showing that her husband, acting in collusion with the original mortgagee, exercised duress, and thereby obtained her signature to a negotiable note, and the mortgage to secure same, as well as to an affidavit containing material representations affecting the mortgage on which the indorsee relied in good faith, although the truth may be shown against the original mortgagee.

NO ERROR IN REFUSING TRIAL BY JURY IN SUIT PURELY OF EQUITABLE COGNIZANCE, such as action to cancel a note and mortgage.

M. E. Clodfelter, J. A. Lindly, and J. V. Maxedon, for the appellant.

G. D. Hurley, for the appellee.

ELLIOTT, J. The first paragraph of the appellant's complaint alleges that she owns the land in controversy in fee; that she executed a note and mortgage to James M. Jamison; that she undertook therein as surety for her husband, Samuel Lane; that she was then a married woman, and received no

part of the consideration for which the note and mortgage were executed. Prayer that the mortgage be canceled and her title quieted.

The second paragraph is substantially the same as the first, except that it sets out specifically the title of the appellant.

The third paragraph alleges that the appellant is the owner in fee of the land in dispute, and that she derived it through her first marriage; but it is not averred how she derived title.

The theory of all the paragraphs of the complaint is, that the mortgage was void, because it was executed to secure the debt of her husband. Had the third paragraph of the complaint averred that all the title she had was vested in her as the widow of her husband, a very different question would be presented: *McCullough v. Davis*, 108 Ind. 292. But this it does not do; on the contrary, it is expressly averred that she is the owner in fee, and this implies that she owns the whole estate absolutely. Where a plaintiff avers that he owns the land in fee, without specifically setting forth his title, the law declares that he owns the entire estate: *Indiana etc. R'y Co. v. Allen*, 113 Id. 581.

The theory of the third paragraph of the complaint, as well as of all the others, plainly is, that the plaintiff owns the whole estate in the land, and that the mortgage which she seeks to have canceled was void, for the reason that it was executed to secure the debt of her husband. By this theory the appellant is bound, and upon it, as we understand counsel's argument, they stand: *Mescall v. Tully*, 91 Ind. 96, and cases cited; *Western Union Telegraph Co. v. Reed*, 96 Id. 195 (198); *First National Bank v. Root*, 107 Id. 224; *Green v. Groves*, 109 Id. 519 (522).

There is a general statement, indefinite in form and vague in meaning, in the third paragraph of the complaint, that the appellant was induced to execute the mortgage through "fear of trouble and personal violence at the hands of her husband"; but this mere general conclusion cannot control the pleading, for pleadings are not judged by detached sentences; on the contrary, they are judged by their general scope and effect: *Neidefer v. Chastain*, 71 Ind. 363 (367).

The third paragraph of the appellee's answer pleads these material facts: The appellee is the owner of the mortgage, having purchased it of the mortgagee in good faith and for value. The note and mortgage were executed for personal property sold to the appellant. She made and delivered to

the appellee's indorser an affidavit stating that she executed the note and mortgage to pay for the property she proposed to buy of him; he relied on this affidavit, and her representations that she was the purchaser of the property, and that the note and mortgage were executed for her sole use and benefit, and not as the surety of her husband. The indorsee of the appellee believed the facts to be true, had no knowledge to the contrary, and relied entirely on the appellant's representations.

This answer is good. The representations of the appellant as to the fact that she was the purchaser of the personal property, and that the note and mortgage were executed to pay for the property thus purchased by her, estop her from denying the truth of those facts. If the note and mortgage were executed by her to pay for property purchased by her, then they are valid; and that they were so executed she cannot deny. The representation is not as to her capacity,—not that at all,—but as to the character of the contract. We need not, however, further discuss this question, for it has been fully discussed and expressly decided in recent cases: *Ward v. Berkshire Life Ins. Co.*, 108 Ind. 301; *Rogers v. Union Cent. Life Ins. Co.*, 111 Id. 343.

We agree with the appellant's counsel that a married woman is not estopped by the mere form or recitals of her contract: *Cupp v. Campbell*, 103 Ind. 213. But that rule has no application here, for the answer does not put the defense upon the recitals of the contract. The defense is put upon the positive representations made by the appellant, and upon which the mortgagee had a right to rely. We do not hold that mere representations will estop a married woman; but we do hold that where they are acted upon in good faith by the person to whom they are made, and who has no information that would lead him to believe they are not true, they will estop her. If made to one who knows that they are not true, or to one who is chargeable with that knowledge, they will not have the effect of an estoppel. Where, however, to permit the married woman to deny what she has positively affirmed would operate as a fraud upon one who has acted in good faith, she will be held to be estopped. It may be that a mere silence when she should speak will not create an estoppel; but where she makes positive representations, and thus misleads one who acts in good faith, an estoppel will arise. Mr. Kelly, in the note to 27 Am. Law Reg. 50, 52 (*Rogers v. Union Cent.*

Life Ins. Co., supra), cites many cases fully supporting this doctrine.

The second paragraph of the reply is addressed to the third paragraph of the answer, and contains these allegations: That the appellant, at the time the note and mortgage were executed, was a married woman; that they were executed to secure the separate debt of her husband; that they, as well as the affidavits, were not voluntarily executed by her, but they were procured by fraud and duress; that James M. Jamison fraudulently colluded with her husband to procure her signature to the affidavit, the note, and the mortgage; that they agreed between themselves that the sale of the property should in reality be to her husband, Samuel Lane, and that the possession of the liquors, saloon, and fixtures should be taken by Samuel Lane, and that he should compel his wife, the appellant, to sign the affidavit, note, and mortgage; that they both knew that she was opposed to saloons, or anything connected with the liquor business, and that she would not sign the papers unless through fear and compulsion; that Jamison knew that her husband was in the habit of getting drunk; that when he was under the influence of liquor he was a violent and dangerous man, and that when in such condition the person, and even the life, of the appellant would be in danger should she refuse to sign the papers; that her husband and Jamison, in order to induce her to sign the papers, caused them to be prepared; that after they were prepared, Jamison furnished Lane with liquor, and caused him to become thoroughly intoxicated; that while Lane was in that condition they took the papers to the appellant, and in the presence of the notary public demanded that she should sign them; that, knowing the disposition of her husband when intoxicated, and knowing that if she refused to comply with his demand she would endanger her life, she did, through fear of personal violence, sign the affidavit, note, and mortgage.

We have no doubt that if the note and mortgage were still in the hands of James M. Jamison, the reply would be good. If a man colludes with the husband to secure from the wife a representation, whether in the form of an affidavit or in any other form, he cannot insist that the wife is estopped from showing that the representation was not true: *Keller v. Orr*, 106 Ind. 406.

The difficulty in the case arises out of the fact that the appellee, Schlemmer, is the *bona fide* indorsee of the note. It

is a note negotiable by the law merchant, and as a general rule such notes are protected against defenses while in the hands of a good-faith holder. The question is, whether the case before us is within the rule. The effect of the representations made by the appellant would, in ordinary cases, be to estop the maker of a promissory note from defeating it in the hands of one who acquired it without notice, for value, and before maturity. If these representations do not estop the appellant, it must be for the reason that, as she was a married woman, the case is not within the general rule.

Our conclusion is, that she must be held bound by the estoppel. It must be known to her as a matter of law that a promissory note, negotiable under the law merchant, is a subject of commerce, and may be freely bought and sold. Knowing this, she must also know that if she makes a solemn and deliberate representation in the form of an affidavit as to the contract out of which it springs, that representation may be used to induce persons to purchase the note she executes. This, added to the fact that our statute expressly provides that a married woman may be bound by an estoppel *in pais*, seems to close the question against the appellant. Nor is this all, for it has been often decided that she may execute a promissory note for property purchased by her, and that ability to contract is now the rule, and disability the exception: *Arnold v. Engleman*, 103 Ind. 512; *Barnett v. Harshbarger*, 105 Id. 410; *McLead v. Aetna Life Ins. Co.*, 107 Id. 394; *Chandler v. Spencer*, 109 Id. 553; *Rosa v. Prather*, 103 Id. 191; *Bennett v. Mattingly*, 110 Id. 197; *Indiana etc. R'y Co. v. Allen*, *supra*.

It is not to be forgotten that the representation upon which the appellee acted was not as to the appellant's capacity to contract, but as to the character of the contract itself. The law fixes her capacity, but she, by her sworn statement, fixed the character of the contract. When she fixed the character of the contract the law entered and fixed her liability. As she gave character to the contract by a solemn and deliberate statement, she cannot be allowed to say, as against a man who has acted in good faith, that her contract was not what she swore it was. If the person who acquired the note acted in bad faith, or had notice, then, doubtless, she would not be bound; but unless he had notice, or did act in bad faith, she is bound. This principle is illustrated by the case of *Gardner v. Case*, 111 Ind. 494, where it was held that a married woman is bound by a mortgage executed under duress exer-

cised by the husband, but of which the mortgagee had no notice.

Our statute, as we have indicated, greatly enlarges the powers of a married woman. She is invested with the power of contracting to almost as great an extent as a *feme sole*. The common-law rule as to estoppel cannot therefore apply to contracts under our statute. The law upon this point is well settled. Mr. Kelly says: "In proportion, therefore, as the enabling statutes have removed a married woman's disabilities, her capacity to be bound by the doctrine of estoppel is enlarged." Cases illustrating this general rule are cited by the author: *Contracts of Married Women*, 122. Another author says: "The general rule, as we have seen it laid down, is, that the doctrine applies to a *feme covert* only to the extent of her capacity to work an estoppel; i. e., she must be authorized to act in and about the matter involved": *Harris on Contracts of Married Women*, sec. 559. In our state this capacity is limited only to specific classes of contracts; for, as we have said, the statute confers upon her the right to execute evidences of indebtedness for property bought by her, and under the rule stated, this would of itself be sufficient to allow an estoppel to operate against her in such a matter as that here in controversy. But the statute goes much further, for it expressly declares that a married woman "shall be bound by an estoppel *in pais*, like any other person": R. S. 1881, sec. 5117.

There was no error in refusing a trial by jury, as a suit to cancel a note and mortgage is purely of equitable cognizance: *Voss v. Eller*, 109 Ind. 260.

The special finding of facts makes a much stronger case against the appellant than the pleadings do, and as we have discussed all the questions there presented, no further discussion is necessary.

Judgment affirmed.

DOCTRINE OF ESTOPPEL APPLIES TO MARRIED WOMEN in most of the states where they have been given extended property rights: *Crenshaw v. Julian*, 4 Am. St. Rep. 719, and cases in note 724. In *Wethersbee v. Farrar*, 97 N. C. 106, it is held that unless there is an element of fraud in the declarations and conduct of a married woman, she cannot be estopped by a contract.

TRIAL BY JURY MAY BE REFUSED IN EQUITY CASE: See notes to *Lee v. Tillotson*, 35 Am. Dec. 626, and *Flint R. S. Co. v. Roberts*, 48 Id. 185 et seq.

BUTLER UNIVERSITY v. SCOONOVER.

[114 INDIANA, 381.]

CORPORATION — CERTIFICATES. — To CONSTITUTE STOCKHOLDER, SOME SORT OF SUBSCRIPTION OR CONTRACT IS REQUIRED, whereby the subscriber obtains the right, upon some condition, to demand stock and to exercise the rights of a stockholder. But it is not essential that a certificate should have issued in order to create the relation of stockholder, provided a contract to take stock had been duly made, or provided the rights, privileges, and emoluments of a stockholder had been enjoyed, with the consent of the corporation.

BOND TO A CORPORATION IS NUDUM PACTUM which assumes that the obligor had subscribed for the corporation's stock, and that the subscription price, which he had retained as a loan, and for which the bond was given, was the consideration of his contract to pay, when it appears that he had never subscribed for nor received any stock, and that he had not in any other manner acquired any right to be recognized as stockholder, and had never acted as such.

OBLIGOR IS NOT ESTOPPED FROM DENYING THAT HE IS A STOCKHOLDER BY RECITAL IN A BOND that he "has retained of his subscription . . . the sum of . . . being the amount of his subscription, as a loan," although this recital might be evidence that a subscription of some kind had been made.

WHETHER ONE BECOMES A STOCKHOLDER BY MERELY MAKING A SUBSCRIPTION for stock in a corporation depends upon the terms of his contract and the charter of the corporation, and whether the subscription was made as preliminary to the organization or after it was under way, for stock thereafter to be issued.

H. W. Chase, F. S. Chase, F. W. Chase, H. Speed, and O. B. Jameson, for the appellant.

F. B. Everett, for the appellees.

MITCHELL, C. J. On the fifth day of September, 1866, Scoonover, as principal, and Morehouse, as surety, delivered a written contract, duly signed by them, to the Northwestern Christian University. It was recited therein that Scoonover had retained two hundred dollars of his subscription to the stock of the university, as a loan made to him by the corporation of so much of its endowment fund, agreeably to the provisions of its charter, which authorized it to give preference to the subscribers to its stock as borrowers. The obligors jointly and severally agreed to pay interest on the amount of the loan at the rate of six per cent per annum in advance, and in the event of their failure to pay the interest according to the agreement, or in case they should thereafter fail to give such further security as the board of directors of the university should at any time require, the principal sum was to become due and payable.

The complaint alleged that Scoonover, on the day upon which the contract sued on bears date, subscribed for two shares of one hundred dollars each of the capital stock of the university, and that he retained the whole amount of his subscription as a loan from the university, and executed the obligation sued on as evidence thereof, with Morehouse as surety.

It was alleged that the name of the university had since been changed, and that default had been made by Scoonover, in that he had failed and refused to pay any interest since November 1, 1879.

Upon an issue that the contract had been executed without any consideration whatever, the cause was tried by a jury, who returned, in a special verdict, substantially the following facts: They found that the bond had been duly executed, but that Scoonover, "at no time before or after the execution of said bond, subscribed for any stock in the Northwestern Christian University." They found, further, that no stock had ever been issued to Scoonover; that he never acted as a stockholder, nor received, owned, or controlled any stock; and that he never received anything as a consideration for the execution of the bond sued on.

The court, over the appellant's motion for judgment in its favor, gave judgment for the defendants below on the special verdict so returned. The propriety of this ruling involves all there is in the case.

The appellant contends that the bond or contract sued on was, in effect, a subscription to the stock of the university, and that hence the finding of the jury that Scoonover never had subscribed for nor received a certificate for any stock, and that he never acted as a stockholder, nor owned or controlled any stock, and that he never received any consideration for the bond, is immaterial. This position is not sustainable. Of course, the fact that no certificate of stock was issued is of itself of no consequence. It is not essential that a certificate should have issued in order to create the relation of stockholder, provided a contract to take stock had been duly made, or provided the rights, privileges, and emoluments of a stockholder had been enjoyed, with the consent of the corporation.

The theory upon which the complaint proceeded was, that Scoonover had subscribed for two shares of one hundred dollars each of the capital stock of the university, and that, instead of paying his subscription in money, he had simply

retained the amount as a loan, in consideration of which he executed the bond sued on, with Morehouse as surety. If this theory had been sustained, whether a certificate had been issued or not, Scoonover, upon payment, at least, if not before, would have had some rights in the corporation which it would have been bound to recognize.

The jury found, and the evidence sustains the finding, or tends to sustain it, that Scoonover never subscribed for any stock. Never having subscribed for any stock, there was, of course, no consideration for the bond, unless in some way he received stock or acted or was recognized as a stockholder. The jury expressly negative each and all of these propositions. They return that the defendant never subscribed for, nor received, owned, or in any manner controlled, any stock, and that he received no consideration whatever for the bond. *Fanning v. Insurance Co.*, 37 Ohio St. 339, 41 Am. Rep. 517, was a suit by an insurance corporation upon a note for three thousand dollars, and to foreclose a mortgage given as a security therefor. It appeared that the defendant had verbally agreed to take three thousand dollars in stock, and had given the note and mortgage in suit in payment therefor. In the absence of proof that the maker of the note had subscribed for stock, so as to be entitled to the rights and privileges of a stockholder, or that she had received stock, or that she had in some other way estopped herself, it was held that her contract was a *nudum pactum*. The doctrine of the case is unquestionably sound, and well supported by authority. It is decisive of the present case.

It does not appear, in the case before us, that there was even an oral agreement to subscribe for stock. The recitals in the bond, and the whole case, assume that Scoonover had subscribed for stock, and that the subscription price was the consideration of his contract to pay. When, therefore, it appeared that he never had subscribed for stock, nor in any other manner acquired any right to be recognized as a stockholder, in the event of payment of the bond, it became entirely clear that his contract was without consideration. Although it may be true that a binding contract of subscription to the stock of a corporation, unless the statute or articles of association provide to the contrary, may be made, without actually signing a formal subscription paper or stock-book, in any manner that the subscriber and corporation clearly manifest their purpose to enter into a contract whereby the relation of stockholder of the cor-

porate stock is to result, — yet there must, in every case, be some sort of subscription or contract, whereby the subscriber obtains the right, upon some condition, to demand stock, and to exercise the rights of a stockholder.

Contracts for membership in a corporation are not different in their essential elements from other contracts. There must be contracting parties, whose minds mutually assent to some proposition, and whose agreement creates corresponding obligations between the parties: 1 Morawetz on Corporations, secs. 44, 62. As a matter of course, if one manifests his intention to become a stockholder in a corporation by some overt act, and with the consent of the corporate body assumes the duties and accepts the privileges of a share-holder, he may be estopped thereafter from denying his liability as such: *Hawley v. Upton*, 102 U. S. 314; *Sanger v. Upton*, 91 Id. 56; *Nugent v. Supervisors*, 19 Wall. 241; Cook on Stock and Stockholders, sec. 52.

The special verdict in the present case, however, goes to the full extent of showing that the minds of the parties never mutually assented to any contract of subscription, or to an agreement to take or deliver corporate stock, for it finds that Scoonover never subscribed for any stock, that he never in any manner acted as a stockholder, and that he received no consideration whatever for the bond sued on.

How can it be said that such a finding would support a judgment upon a complaint which distinctly charges that the consideration of the bond sued on was the subscription price of two shares of stock?

It is said, however, that the recital in the bond that Scoonover was a stockholder estopped the appellees from denying that fact. However that might be in the event the bond contained such a recital, it is enough to say the only basis for the proposition is the recital that Scoonover "has retained of his subscription for two shares of capital stock . . . the sum of two hundred dollars, being the amount of his subscription, as a loan." While this recital might well have been regarded, in the absence of countervailing evidence, as sufficient proof that a subscription of some kind had been made, it was not, without more, conclusive, either upon the corporation or Scoonover, that the latter was a stockholder. The recital was in no sense contractual, but was a mere statement of the consideration of the bond, and was in no sense different in effect than would be a recital in a promissory note or other contract for the payment of money, concerning the consideration upon which it

was executed. Whether one who subscribes for stock in a corporation becomes, by the mere fact of making the subscription, a stockholder therein, depends upon the terms of his contract and the charter of the corporation, and whether the subscription was made as preliminary to the organization, or after it was under way, for stock thereafter to be issued: 1 Morawetz on Corporations, secs. 46, 61; *Clark v. Continental etc. Co.*, 57 Ind. 135; *Lake Ontario Shore R. R. Co. v. Curtiss*, 80 N. Y. 219.

The jury do not find that any calls were paid on subscription to the stock. What they find is, that interest was paid on the bond in suit.

As before observed, the turning-point in the special finding is, that it distinctly negatives the issuable fact tendered by the complaint that there had been a subscription to the stock of the university. All that appeared in evidence tending to show a subscription was the recital contained in the bond sued on; and while this was some and might well have been regarded as sufficient proof of a subscription of some kind, it was neither a subscription in itself, nor was it conclusive evidence that a subscription had been made.

What the rights of the corporation would have been in case it had tendered the stock alleged to have been subscribed for, before the bringing of the suit, and whether, in that event, a plea of no consideration for the bond would have been available, and supported by the evidence, we need not now decide.

It is inferable that the bond sued on was not executed until years after the corporation was organized, and the fact must not be ignored that subscriptions to stock, before or in the process of organizing a corporation, and agreements to take stock in an existing corporation, stand on an entirely different footing.

Judgment affirmed, with costs.

LIABILITY OF SUBSCRIBERS AND STOCKHOLDERS OF CORPORATION is very fully discussed in the note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 806-873.

NEW v. SAILORS.

[114 INDIANA, 407.]

CHATTEL MORTGAGE. — DEBTS OF THE MORTGAGOR PAID BY THE MORTGAGEE MUST BE IDENTIFIED, either by the petition itself or by evidence based on proper averments, as being the same debts as those described in the mortgage; otherwise no recovery can be had against the assignee of the mortgagor which would give the mortgagee a preference over other creditors. The lien or security continues so long as the debt is shown to be the same as that described in the mortgage.

CHATTEL MORTGAGE — IMPLIED AGREEMENT TO ACCOUNT FOR PROCEEDS OF SALE. —It will be presumed, until the contrary appears, that a mortgagor who is permitted to retain possession of and sell mortgaged chattels does so under an agreement to account as the agent of the mortgagee, and the proceeds will be regarded as applied to the liquidation of the mortgage debt, whether they have been actually paid over or not. If, however, it appears that there was an understanding that the mortgagor was not to account, but that he might deal with the property to all intents and purposes as if it were his own, an inference of fraud arises which renders the mortgage void.

W. R. Stokes, for the appellants.

G. W. Stubbs, for the appellee.

MITCHELL, C. J. On the twenty-first day of April, 1884, James L. Sailors, being the owner of a stock of dry goods, boots, shoes, hats, caps, etc., in Thorntown, Boone County, Indiana, executed a chattel mortgage, covering the stock above described, to his brother, Hamilton M. Sailors, of Kokomo, Indiana. It was recited in the mortgage that the mortgagor was indebted to the mortgagee in the sum of seventeen hundred dollars, evidenced by a promissory note dated January 1, 1883, for twelve hundred dollars, and by standing guaranty of twelve hundred dollars to Byram, Cornelius, & Co., of the city of Indianapolis; and that if the mortgagor should well and truly pay the note at maturity, and save the mortgagee harmless from the guaranty, then the mortgage was to be void. The mortgage contained a further stipulation to the effect that the mortgagor should retain possession of the property mortgaged until the note and guaranty became due, and that he would not remove the property from the place where it then was, "except the necessary sales to be made in carrying on said business of selling goods." The mortgage was duly recorded.

On the 4th day of May following, the mortgagor, finding himself in failing circumstances, made a voluntary assign-

ment for the benefit of his creditors. Pending the administration of the matter of the assignment, the mortgagee filed an intervening petition in the Boone circuit court, in which he set forth that there was due him from the assignor the sum of \$1,451.96, for which amount he claimed priority over the general creditors on account of the chattel mortgage above mentioned, a copy of which was filed with his petition. The petitioner alleged in his petition that \$900.62 of the amount for which he claimed a preference had been paid by him in taking up nine promissory notes, which he had theretofore signed as the surety of the assignor, to Byram, Cornelius, & Co., and that he had paid \$292.35 to the same parties on an account due from the assignor, for the payment of which he had become bound by a written guaranty. It was further alleged that the petitioner had paid \$258.98 to Butterworth & Co., of Cincinnati, Ohio, as surety for the assignor.

The petitioner alleged that the mortgage was a valid lien on the goods assigned to secure the repayment to him of the several sums above mentioned, and he asked an order of the court directing payment by the assignee accordingly.

The appellants were admitted, upon their own application as creditors of the assignor, to defend against the claim for preference.

Issue was taken upon the petition of the intervenor by a general denial filed by the appellants.

The court allowed the petitioner's claim in full, and ordered it paid out of the general fund, substantially as prayed in the petition.

The evidence shows without dispute that the mortgagee, as surety for the mortgagor, paid nine notes of one hundred dollars each to Byram, Cornelius, & Co. It shows with equal certainty that he paid \$258.98, as surety, to Butterworth & Co.; and also a debt of \$292.35 due to Byram, Cornelius, & Co., for which he was liable on the written guaranty mentioned in the petition.

The infirmity in the appellee's case is, that neither in the petition nor in the evidence do any of the above-mentioned debts, except the one last described, appear to have any relation to or connection with the debt or guaranty described in the mortgage.

The purpose of a mortgage, ordinarily, is to secure some debt owing by the mortgagor to the mortgagee, or to indemnify the latter against liability or loss on account of some

engagement of the former for which the latter may have become bound.

While literal accuracy in describing the debt secured or the condition upon which the mortgage is to become void is not required, it is essential that the character of the debt and the extent of the encumbrance should be defined with such reasonable certainty as to preclude the parties from substituting other debts than those described, thereby making the mortgage a mere cover for the perpetration of fraud upon creditors: *Pettibone v. Griswold*, 4 Conn. 158; 10 Am. Dec. 106; 1 Jones on Mortgages, sec. 70.

As has been seen, the condition of the mortgage in the present case was, that the mortgagor would pay a promissory note of twelve hundred dollars due the mortgagee in one year from January 1, 1883, and save him harmless from a standing guaranty for twelve hundred dollars to Byram, Cornelius, & Co. Conceding that the description as found on the face of the mortgage is abundantly sufficient, it is not perceived how, without extraneous evidence, it can be deemed to embrace the notes paid to Byram, Cornelius, & Co., or the other debt to Butterworth & Co.

For anything that appears, either in the petition or evidence, the debts paid may have no relation whatever to or connection with the guaranty or note described in the mortgage. It may be true, as the appellee asserts the fact to be in his brief, that the consideration of the twelve-hundred-dollar note is in some way related to the debts paid by the mortgagee, but until the fact is made to appear in some legitimate way, it cannot be assumed. There is no doubt, in case proper averments to that end have been made in a complaint, but that extraneous evidence is admissible to explain the consideration of the debt or condition in a mortgage, or in case of ambiguity to identify and apply the condition to the subject-matter; but in the absence of explanatory averments and proof, the court may not assume that debts which in no way correspond with those described are within the terms or security of the mortgage. It would be altogether useless to require that the debts for which the mortgage is to stand as security be described, if other claims bearing no sort of resemblance to those specifically set forth could be regarded as covered by the mortgage, without evidence showing their relation to the mortgage: *Bramhall v. Flood*, 41 Conn. 68; *Doyle v. White*, 26 Me. 341; 45 Am. Dec. 110; *Storms v. Storms*, 3 Bush, 77; 1 Jones on Mortgages, secs.

345, 378. Of course, this does not mean that the form of a debt secured by a mortgage may not be changed, or that such a change impairs the lien of a mortgage: *Shuey v. Latta*, 90 Ind. 136.

Whatever transmutations the debt may undergo, so long as it is shown to be the same debt as that described in the mortgage, the lien or security continues. The judgment in the present case must be reversed because it was not shown that the debt sued for was the debt described in the mortgage.

As has been seen, the mortgagor was authorized by the terms of the mortgage to retain the possession of the property mortgaged, with authority to sell at retail in the ordinary course of trade. There was no agreement, so far as appears, that the proceeds should be applied to the liquidation of the mortgage debt, nor is there anything to show an agreement or understanding that the mortgagor might use the proceeds for his own benefit.

It cannot be judicially inferred from a stipulation such as that above referred to, without more, that the mortgage was made with fraudulent intent: *Fisher v. Syfers*, 109 Ind. 514.

It was disclosed by the evidence that the mortgagor remained in possession of the stock for about two weeks after the execution of the mortgage, retailing goods as he had done before. It did not appear what had been done with the proceeds of the goods sold, nor did it appear, as has been observed, that there was either an express or implied agreement that the mortgagor should apply them to his own use. The appellants insist that the mortgage must be adjudged fraudulent as against the mortgagor's creditors, in the absence of an affirmative showing that the mortgagor either agreed or was required to account for the proceeds of sales made while he remained in possession. This conclusion does not necessarily follow.

The question of fraudulent intent is a question of fact, and not of law. Therefore, until the contrary appears, it will be presumed that a mortgagor who is permitted to retain possession of and sell mortgaged chattels does so under an agreement to account as the agent of the mortgagee, and the proceeds will be regarded as applied to the liquidation of the mortgage debt, whether they have been actually paid over or not: *Hills v. Stockwell etc. Co.*, 23 Fed. Rep. 432; *Brackett v. Harvey*, 91 N. Y. 214.

This is the limit to which presumptions in favor of good faith will be carried, under section 4924, Revised Statutes, 1881.

Such an agreement, if made, is not opposed to the proper and legitimate idea and purpose of a chattel mortgage. It accomplishes the purpose of the mortgage by converting the property into money for the liquidation of the debt, through the agency of the mortgagor.

If, however, it affirmatively appears that there was no agreement to account, and the mortgagor is permitted, either by an express or implied agreement with the mortgagee to continue in possession, with the right to sell the property and appropriate the proceeds to his own use, the transaction will be regarded as a fraud upon creditors, and void: *Southard v. Benner*, 72 N. Y. 424.

Although a mortgage may be valid on its face, if it appears that there was a secret agreement or implied understanding that the mortgagor might continue to sell the property as his own, with the right to support himself and family out of the sales, without accounting for the proceeds, such an arrangement or understanding is, in effect, a secret trust for the benefit of the mortgagor, and is void as to creditors, within the terms of section 4921, Revised Statutes, 1881: *Anderson v. Patterson*, 64 Wis. 557; *Bannon v. Bowler*, 34 Minn. 416; *Greenebaum v. Wheeler*, 90 Ill. 296. A secret trust being thus established, fraud becomes an inference of law: *Wilson v. Sullivan*, 58 N. H. 260.

A debtor cannot convey real estate or transfer personal property to another, to be held either wholly or in part upon a secret trust for his own benefit: *Moore v. Wood*, 100 Ill. 451; *Lukins v. Aird*, 6 Wall. 78; *Plunkett v. Plunkett*, 114 Ind. 484.

A duly recorded chattel mortgage, given to secure an honest debt, even though it contains a stipulation authorizing the mortgagor to retain possession and sell, will not be presumed fraudulent as against creditors; and therefore, until the contrary is shown, the law will intend an agreement that the mortgagor should sell as the agent of the mortgagee, and account to him for the proceeds. If, however, it appears that there was an understanding that the mortgagor was not to account, but that he might deal with the property to all intents and purposes as if it were his own, an inference of fraud arises, which renders the mortgage void. Such an understanding may appear by proof of an oral agreement, or it may be inferred from the fact that the mortgagor made sales of the

property and used the proceeds, with the knowledge of the mortgagee, without being asked or required to account.

So far as is disclosed by the evidence in the present case, it does not appear that the mortgagor applied any part of the proceeds of sales made to his own use, or that there was any agreement, either expressed or implied, that he might do so. It was not shown, therefore, that the mortgage was fraudulent as against creditors.

The judgment must be reversed, however, for the reasons already given.

Judgment reversed, with costs.

CHATTEL MORTGAGE AUTHORIZING MORTGAGOR TO REMAIN IN POSSESSION, and to sell or otherwise deal with the mortgaged property as his own, is fraudulent and void: See *Roundy v. Converse*, ante, p. 240.

GARVIN v. DAUSSMAN.

[114 INDIANA, 429.]

MUNICIPAL CORPORATIONS — ASSESSMENTS. — ORDINANCE IS UNCONSTITUTIONAL, and lacks the essential element of “due process of law,” when it authorizes an assessment against property, but makes no provision for notice, and affords the owner no opportunity to be heard concerning the correctness of the assessment. The notice and hearing required by the constitution need only be adapted, however, to the nature of the assessment proposed.

PROCEEDINGS FOR STREET IMPROVEMENTS REQUIRE NOTICE AND HEARING to warrant the imposition of a charge by “due process of law,” where the cost of such improvement is to be apportioned among those benefited.

VALIDITY OF ORDINANCE. — ALTHOUGH NO PROVISION IS MADE FOR NOTICE AND HEARING in proceedings for street improvements by either the charter of a city, or an ordinance enacted thereunder, yet if under the ordinance in question the assessment could only be enforced by proceedings similar to those in foreclosing mortgages where notice would be required and an ample opportunity be afforded for inquiring fully into the legality and amount of the assessment, such ordinance is valid.

PROVISION IN CITY CHARTER, THAT MERE INFORMALITIES IN MAKING ASSESSMENT SHALL CONSTITUTE NO DEFENSE, deprives the property owner of no substantial rights, and does not affect the merits of the proceedings under which improvement was completed, but only refers to technical or formal objections.

G. A. Cunningham, for the appellant.

MITCHELL, C. J. Jacob Daussman and Henry Alexander, partners under the firm name of Jacob Daussman & Co., com-

plained of Thomas E. Garvin, and alleged that they had been awarded the contract for the improvement of a certain street in the city of Evansville, which improvement it is averred had been regularly ordered, and the contract therefor duly let, by the common council of the city. The plaintiffs claimed that they had fully executed their contract and completed the improvement, and that the cost thereof had been duly estimated, apportioned, and assessed as the law requires.

It is averred that the defendant is the owner of a certain tract of real estate abutting upon the improvement, and that his proportion of the cost thereof, according to the assessment made by the common council, amounted to \$79.36, which sum remained unpaid, and for which a precept had been duly issued to the plaintiffs on the twentieth day of November, 1885. The proceedings of the common council are exhibited with the complaint. Prayer for a judgment and for the foreclosure of the lien allowed by law.

Demurrer to the complaint was overruled, after which there was a trial upon an issue made by the general denial. There was a finding for the plaintiffs, and judgment according to the prayer of the complaint.

The city of Evansville derives its existence as a municipality from a special charter or law enacted by the legislature in the year 1847. Section 58 of that law makes provision for the improvement and repair of streets. It is enacted therein, among other things, that the cost of street improvements may be assessed and charged upon all lots or parcels of land fronting on the part of the street improved. It gives authority to the common council to provide by general ordinance for collecting the cost and expenses of such improvements, and also for the sale of the lots against which the cost and expenses may be assessed. It empowers the common council to make provision for the collection of the cost of street improvements by suit, and for the enforcement of liens as other liens are enforced, and it also declares that no informality of any order of the common council directing the making of any such improvement or repairs, nor in the making of the assessment or apportionment of the costs and expenses of the same, shall afford the defendant a defense in any action for the collection of any such costs and expenses, or for the enforcement of the lien therefor, provided the improvement or repairs were made in substantial compliance with the provisions of the act and the ordinance as passed for carrying it into effect.

The appellant concedes that the common council, in pursuance of the authority thus conferred, duly enacted general ordinances regulating the manner of making street improvements in the city of Evansville, and providing for the collection of the cost and expenses of such improvements, and that the improvements in question were made pursuant to an ordinance duly adopted on the second day of May, 1881. The ordinance is not regularly set out in the record, but, as it appears in the appellant's brief, and according to the concession made by counsel, it provides that when the council shall, in pursuance of the charter, order and require any improvements to be made on any of the streets of the city, an order shall be made designating the improvements, and thereupon the clerk shall advertise for bids, and the work shall be let to the lowest responsible bidder, who shall comply with the requirements as to bond, etc.

Section 2 provides for the mode of apportioning the cost of the work.

Section 3 provides that the mayor and city surveyor shall, within seven days after the letting of the contract, report to the council the whole cost of the work, and the separate amount chargeable against each property holder, and that the council shall thereupon pass an order assessing and charging each lot or parcel of real estate with its share or proportion of such expense.

Section 4 makes it the duty of the council, upon the completion of the work, to order a precept to be issued to the contractor against each parcel of real estate so assessed, which precept shall be signed by the mayor and attested by the clerk, and shall entitle the contractor to collect the same in his own name.

The subsequent sections of the ordinance authorize the contractor to collect the assessment by the enforcement of the lien thereof in the same manner mortgages are foreclosed.

It is insisted on the appellant's behalf that the assessment made against his property under the provisions of the foregoing ordinance was invalid, because neither the charter of the city of Evansville, nor the ordinance enacted thereunder, makes any provision for notice to the owners of property to be affected by street improvements, or for an appeal from the precept or assessments, as is usual in such cases. This premise being assumed, the conclusion is drawn that so much of the ordinance as authorizes the abutting property to be

charged with the cost of the improvement is in contravention of that provision of the federal constitution which declares, in effect, that no state shall deprive any person of life, liberty, or property "without due process of law."

The question presented is not whether the law and the ordinance regulating the improvement of streets have been followed; but, conceding that they have been, it is asserted that they are inadequate to create a charge against, or to impose a burden upon, property, according to "the law of the land."

It is, without doubt, essential to the validity of every law under which proceedings may be had for the taking of property, or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice at some stage in the proceeding, and that it afford the owner an opportunity to be heard concerning the legality of the assessment, before some tribunal or body authorized to correct errors, or give appropriate relief, before the property is taken or the charge made absolute.

As was well said in an analogous case: "The constitution sanctions no law imposing such an assessment, without a notice to, and a hearing or an opportunity of a hearing by, the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard": *Stuart v. Palmer*, 74 N. Y. 183; 30 Am. Rep. 289; *Fries v. Brier*, 111 Ind. 65; *Campbell v. Dwiggins*, 83 Id. 473; *Whiteford Tp. v. Probate Judge*, 53 Mich. 130; *Thomas v. Gain*, 35 Id. 155; 24 Am. Rep. 535; *Brown v. City of Denver*, 7 Col. 305; *City of Philadelphia v. Miller*, 49 Pa. St. 440; *Santa Clara v. Southern Pacific R. R. Co.*, 9 Saw. 165; *Overing v. Foote*, 65 N. Y. 263; *Cooley on Taxation*, 265, 266.

Any proceeding, therefore, the result of which is to deprive the owner of his property, or to impose a burden upon or create a charge against it, and which is carried on under a law which makes no provision for notice, and affords the owner no opportunity to be heard concerning the correctness of the assessment, and whether the amount charged against him or his property was ascertained and apportioned in good faith and in the manner provided by law, is in contravention of the constitution, and lacks the essential element of "due process of law." The fact must, however, be kept in view that the

notice and hearing which the constitution demands need only be such as are adapted to the nature of the assessment proposed, and such as afford to each individual affected the opportunity to show that, according to the method prescribed by competent authority for making the assessment, the amount charged against him is incorrect. In the imposition of poll or occupation taxes, where a certain sum is assessed against each individual exercising a given avocation, or according to his age, without regard to actual benefits, the necessity of notice and a hearing is reduced to a minimum. To a measurable extent, the same principle is involved when the cost of an improvement is, as by law in proper cases it may be, apportioned by mere mathematical calculation, according to a certain rate per front foot: *Thomas v. Gain, supra*; *Lipps v. City of Philadelphia*, 38 Pa. St. 503; *City of Philadelphia v. Tryon*, 35 Id. 401.

The principle which underlies and upholds special assessments, such as that involved in the present case, is, that the lands assessed are enhanced in value to an amount equal to the cost of the improvement, which is to be apportioned among those specially benefited, in the manner prescribed by law: *Heick v. Voight*, 110 Ind. 279; *Ross v. Stackhouse*, 114 Id. 200; *Desty on Taxation*, 1237; *Cooley on Taxation*, 416.

While the character of notice and the limits within which the hearing may be confined are in each instance dependent, to a greater or less extent, upon the nature of the case, proceedings for street improvements, where the cost is to be apportioned among those benefited, are, nevertheless, within the rule which requires notice and a hearing, in order to the imposition of a charge by "due process of law." The difficulty of framing a "perspicuous, comprehensive, and satisfactory" definition of the phrase, "due process of law," has often been the subject of remark, and the courts have uniformly refrained from attempting to give it a precise or authoritative definition: *Davidson v. New Orleans*, 96 U. S. 97; *Hurtado v. People*, 110 Id. 516; *Hagar v. Reclamation Dist. No. 108*, 111 Id. 701; *Stuart v. Palmer, supra*.

It has been said, however, that, "in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process

of law': *Davidson v. New Orleans, supra*. If the law directing the proceedings affords the property owner an opportunity to be heard, after due notice, in a tribunal competent to afford him relief appropriate to the nature of the case, so that the charge against his property only becomes conclusive after the opportunity for a hearing has been had, it cannot be said that his property has been taken or burdened without due process of law. That the legislature may make provision for local improvements, which are to a degree of public utility, or in a sense of a public character, and impose the cost thereof on the property or district to be specially benefited,—in any manner not manifestly unfair or unequal,—without first providing for intermediate proceedings to determine the necessity for the improvement, or the cost of making it, and that it may prescribe the kind of notice and the time and manner in which it shall be given, is well settled; and that it may delegate the like power to a municipal corporation is likewise settled: *County of Hennepin v. Bartleson*, 37 Minn. 355; *Gatch v. City of Des Moines*, 63 Iowa, 718; *Matter of De Peyster*, 80 N. Y. 565; *Washington Ave.*, 69 Pa. St. 352; 8 Am. Rep. 255; *Fairbanks v. Mayor etc.*, 132 Mass. 42.

In like manner the legislature may commit to the common council of a city, or to a tribunal specially provided for the purpose, the power of apportioning the cost of an improvement, and of assessing the expense thereof, upon the property benefited in the manner provided by law, unless the method prescribed is plainly unadapted to arriving at a fair and equitable result, and also to determine what property within the limits defined, if any are defined, will be benefited by the improvement.

In respect to all such questions, the determination of the common council, or other body, within the limits of the jurisdiction specially committed to it, may be made conclusive. This power has been exercised and sanctioned too long to be now open to question: *City of Fort Wayne v. Cody*, 43 Ind. 197; *Ricketts v. Spraker*, 77 Id. 371; *Anderson v. Baker*, 98 Id. 587; *Thomas v. Gain, supra*; *Warren v. Grand Haven*, 30 Mich. 24.

It is essential to the public good that the necessity for street and other public improvements, and the cost of making them, and such other proceedings as are necessary to insure the prompt execution of the work, be determined and taken in a comparatively summary way.

To give each property owner the right to contest every step in such an undertaking, would be, in effect, to prohibit the improvement, or render its execution practically impossible in many instances.

If, therefore, the law provides for giving notice and for a method whereby the property owner may ultimately challenge the correctness of the assessment made against his property, in respect to whether it was made in good faith, without intervening mistake or error, and according to the method and under the safeguards provided by the law,—the constitutional provision is to be deemed satisfied.

These ends seem to have been adequately provided for by the ordinance under which the improvement involved in the present case was made.

It is conceded that, under the ordinance, the assessment against the appellant's property could only be enforced by legal proceedings in a court having jurisdiction to foreclose mortgages. Such proceedings could only be taken in pursuance of notice, and in a court in which ample opportunity would be afforded for questioning the validity of the proceedings for the improvement of the street, and of all other matters respecting the legality and amount of the assessment, or which might constitute a legitimate cause of grievance to the property holder.

It is true, as we have seen, the statute under which the city of Evansville derives its corporate existence provides that mere informalities of the common council in directing the improvement, or in making the assessment or apportionment of the cost thereof, shall not afford a defense against the collection of the cost, provided the improvements were made in substantial conformity with the act and the ordinances passed in pursuance thereof. This, however, deprives the property owner of no substantial right; it does nothing more than take away from him the opportunity to urge technical or formal objections, which do not affect the merits of the proceedings under which the improvement was completed: *Hagar v. Reclamation Dist. No. 108*, *supra*; *Reclamation Dist. No. 108 v. Evans*, 61 Cal. 104.

We find no error. The judgment is affirmed, with costs.

DUE PROCESS OF LAW, GENERALLY: See note to *Flint R. S. Co. v. Foster*, 48 Am. Dec. 269 et seq., and see particularly pages 278, 279, as to validity of assessments with notice.

CLEVELAND, COLUMBUS, CINCINNATI, AND INDIANAPOLIS RAILWAY COMPANY v. WYNANT.

[114 INDIANA, 525.]

NEGLIGENCE. — EVIDENCE OF OTHER SIMILAR OCCURRENCES ON OTHER OCCASIONS IS NOT ADMISSIBLE for the purpose of raising a presumption that the particular accident in question happened, or that the place was defective and dangerous, or that the situation was of such a character that the occurrence resulting in the injury complained of might well have taken place.

EVIDENCE. — WHETHER ANY PARTICULAR OBJECT IS CALCULATED TO FRIGHTEN HORSES IS NOT TO BE PLEADED AND PROVED, but is to be determined by the experience, observation, and intelligence of the court and jury as applied to all the facts of the particular case before them.

OWNER OF OBJECT OBSTRUCTING HIGHWAY IS NOT NECESSARILY LIABLE FOR DAMAGES resulting from fright thereby occasioned to horses, merely because such obstruction is in violation of a statute. There must have been a natural causative connection between the violation of the statute and the frightening of the horses to render the owner liable; and the injury must in each case be proximately such as was within the purpose and protection of the statute.

NEGLIGENCE — INSTRUCTION. — RAILWAY COMPANY HAS RIGHT TO LEAVE ITS CARS AT ANY POINT ON ITS SIDE-TRACK except in or upon the highway; and where a car was so left, but was afterwards moved upon the highway by persons for whom the company was not responsible, and while there it frightened the plaintiff's horses, and she was injured in consequence, no liability is created against the company, unless it negligently permitted the car to remain upon the highway an unreasonable length of time, and it is error to refuse an instruction to that effect.

H. H. Poppleton, S. H. Holding, M. S. Robinson, and J. W. Lovett, for the appellant.

H. D. Thompson, for the appellee.

MITCHELL, C. J. Action by Harriet Wynant against the appellant railway company to recover damages for injuries alleged to have been suffered by the plaintiff from the overturning of her carriage, the horses having taken fright at a box-car which, it is charged, the company unlawfully and negligently permitted to be and remain partially in and upon a public highway over which the plaintiff was traveling.

The case was considered once before by this court, and reversed because the evidence did not sustain the verdict of the jury: *Cleveland etc. R'y Co. v. Wynant*, 100 Ind. 160.

A second trial has been had, with the result that judgment has again been rendered for the plaintiff. The case is before us a second time upon the same pleadings, and, according to the insistence of appellant's counsel, upon substantially the same evidence.

Waiving any observations concerning the sufficiency of the evidence, or whether it is in any essential respect variant from what it was before, it is enough to say the judgment must be reversed, for errors hereinafter pointed out.

To sustain her case, the plaintiff gave evidence tending to show that certain empty, and for the time being unused, freight-cars, which had been stored on a short railway track, which diverged from the company's main line to a gravel pit, had been permitted to encroach from five to eight feet on either side of a public highway over which the above-mentioned track lay, leaving a space of from fifteen to twenty-five feet in width of the traveled way between the projecting cars.

There was evidence tending to show that the plaintiff and her husband were passing over the highway in a vehicle drawn by two gentle horses. When about to go upon the railway track between the cars, without having previously shown any signs of fear, the horses suddenly took fright and became unmanageable. Whether they were frightened at an empty car or at noise which proceeded from it, is immaterial to the questions to be considered.

There was some evidence tending to show that a box-car had encroached upon the road for several days prior to the accident.

The railway company introduced evidence tending to show that the car had been let down on the highway, on the day of the accident, by the unauthorized interference of some boys with the brakes. The car was an ordinary empty box-car, such as is in common use on all railroads.

At the trial, the plaintiff produced witnesses who testified that they had passed over the highway in question several days prior to that on which the accident happened, and, after describing the situation of the cars as they then observed them, and the manner in which they then projected into the highway, they were permitted to testify, over objection, that their horses took fright or "shied" at the cars.

Nothing appeared concerning the disposition of the horses driven, by the several witnesses, in respect to whether or not they were ordinarily gentle and well disposed, or whether they were under careful guidance, and so the evidence might well have been excluded on that account. But if these objections had been obviated, we can discover no sound principle which justified the admission of the evidence.

The principal facts in dispute under the issues were, whether

or not the railway company had unlawfully or negligently placed, or unreasonably permitted, its empty cars to remain upon a public highway, thereby causing the horses attached to the carriage in which the plaintiff was seated to take fright and run away, resulting in an injury for which she was in no way blamable.

The evidence admitted pertained to facts altogether aside from those in dispute, and in no way tended to raise a legal presumption as to the disputed facts. It could have had no other effect than to mislead the jury and distract their attention from the real issues in the case. There is no fixed rule governing the frightening of horses. An object that may render one unmanageable from fear, another may pass without notice. It does not follow, because one or more may have taken fright at a given object in a highway, that the object was necessarily frightful to all gentle horses; nor does proof that a number of horses took fright at an object raise a legal presumption that another horse, on a different occasion, became frightened at the same object: *Piollet v. Simmers*, 106 Pa. St. 95; 51 Am. Rep. 496; *Denver etc. R'y Co. v. Glascott*, 4 Col. 270; *Newsom v. Georgia Railroad*, 62 Ga. 339; *Durbrow v. McDonald*, 5 Bosw. 130; *Wentworth v. Smith*, 44 N. H. 419; 82 Am. Dec. 228.

The railway company was not bound to anticipate and make preparation to meet testimony of the character of that in question; nor would it have been heard to prove, in rebuttal, that other gentle horses had passed between the cars without taking fright, or that the horses which took fright were vicious and unsafe under ordinary circumstances: *Bauer v. City of Indianapolis*, 99 Ind. 56; *Kidder v. Inhabitants of Dunstable*, 11 Gray, 342; *Temperance Hall Ass'n v. Giles*, 33 N. J. L. 260.

Thus, in the case first above cited, it was held, in a suit against a city for an injury received in consequence of an obstruction upon a sidewalk, that it was not proper to admit evidence to show that others had passed over the same obstruction without injury.

Where it becomes necessary to affect those charged with the duty of keeping highways, bridges, or other structures in a safe condition, or of keeping only competent persons in their service, with notice of defects or unfitness, or where the question is as to the safety or availability of a machine or contrivance designed for a particular purpose or for practical use, evidence is admissible to show how the thing served when put to the use

for which it was designed, in the one case, or that occurrences of a character to make the defect or incompetency notorious had taken place, in the other: *Pittsburgh etc. R'y Co. v. Ruby*, 38 Ind. 294; 10 Am. Rep. 111; *Cleveland etc. R. R. Co. v. Newell*, 104 Ind. 264; 54 Am. Rep. 312; *City of Delphi v. Lowery*, 74 Ind. 520; 39 Am. Rep. 98; *City of Fort Wayne v. Coombs*, 107 Ind. 75.

The present case does not come within the rule above stated. None of the occurrences described were of such a character as to convey notice to the railway company, or to be known to any others than the witnesses themselves.

Evidence of other similar occurrences, on other occasions, is not admissible for the purpose of raising a presumption that the particular accident in question happened, or that the place was defective and dangerous, or that the situation was of such a character that the occurrence resulting in the injury complained of might well have taken place. The facts are the only legitimate evidence of the injury and of the manner and cause of the occurrence: *Ramsey v. Rushville etc. G. R. Co.*, 81 Ind. 394; *Collins v. Inhabitants of Dorchester*, 6 Cush. 396; *Hubbard v. City of Concord*, 35 N. H. 52; 69 Am. Dec. 520; *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239; *Hawks v. Inhabitants of Charlemont*, 110 Id. 110; *Blair v. Inhabitants of Pelham*, 118 Id. 420.

The case is parallel in principle with *Hudson v. Chicago etc. R'y Co.*, 59 Iowa, 581. In that case, the plaintiff claimed damages for injuries to his horse, resulting from defective planking, at a railway crossing. The judgment of the lower court was reversed because a witness was permitted to testify that, some time prior to the injury complained of, a horse driven by him had got his foot between the plank and rail at the same place where the plaintiff's horse was injured.

We are aware of the fact that some contrariety exists in the decisions upon the point in question. In our opinion, the rule above indicated is the one justified by the decisions of this court, and altogether the safer one upon principle: *Patterson on Railway Accident Law*, 420.

There is, in the present case, no open, visible connection between the evidentiary facts, or independent occurrences, out of which it is assumed certain presumptions arise, and the facts sought to be established by deduction from the evidentiary facts proved. This the law requires. The jury must not be left to decide the principal facts by making remote inferences

from facts having no visible connection with those in dispute: *United States v. Ross*, 92 U. S. 281.

The only presumptions of fact which the law recognizes are those which arise or may be inferred immediately from the facts proved: *Manning v. Insurance Co.*, 100 U. S. 693; *Douglass v. Mitchell*, 35 Pa. St. 440.

It must have been assumed, because some other horses were frightened at the car, that it was necessarily an object calculated to frighten gentle horses, and therefore that those drawing the plaintiff's carriage became frightened at it. The conclusion was not a natural deduction from, nor had it any visible or probable connection with, the facts: *McAleer v. McMurray*, 58 Pa. St. 126.

It might be proved that horses of ordinary gentleness took fright at a newspaper, or other like object, casually left in a public highway, but it would hardly be contended that proof might be heard to show that a newspaper was an object naturally calculated to frighten horses of ordinary gentleness.

It is well settled that one who negligently or without right places an object, naturally calculated to frighten horses of ordinary gentleness, within the limits of a public highway, or who wrongfully suffers such an object, although placed there without fault, to remain an unreasonable length of time, may become liable for an injury occasioned by the fright of horses thereat: *Town of Rushville v. Adams*, 107 Ind. 475; *Turner v. Buchanan*, 82 Id. 147; 42 Am. Rep. 485; *Piollet v. Simmers*, *supra*.

Such an object, wrongfully placed or unreasonably kept or maintained in a public highway, may become a nuisance, for which the author may incur liability to a person suffering special injury therefrom.

As to what objects may lawfully be placed within the limits of a public highway, and as to what may constitute a reasonable time during which such objects may be kept there, must depend upon the circumstances of each particular case. Horses may take fright at wheelbarrows, road-engines, covered wagons, box-cars, reaping-machines, building material, and an indefinite number of other things which are not nuisances *per se*, when found within the limits of a public highway; and yet all these may become nuisances by being negligently permitted to obstruct a highway, depending upon the circumstances of each case. Horses of ordinary gentleness become accustomed to such objects, when the objects are

found in their customary places. They are more liable to become alarmed when they encounter such an object in an unusual place or under extraordinary circumstances. This is part of the common knowledge possessed by all intelligent persons of mature years.

All horses are disposed to scare or shy at objects of an unusual character in a highway. Roads are prepared with reference to this generally known disposition, and persons who place or leave objects in a highway are likewise charged with notice of this habit.

These are things which every adult person of ordinary experience must be presumed to know. It is not, therefore, a subject to be pleaded and proved, whether a box-car, or any other particular object, is naturally calculated to frighten horses. This is to be determined by the experience, observation and intelligence of the court and jury as applied to all the facts of the particular case before them: *Gilbert v. Flint etc. R'y Co.*, 51 Mich. 488; 47 Am. Rep. 592; *Wabash etc. R'y Co. v. Farver*, 111 Ind. 195; 60 Am. Rep. 696.

The mere fact that an object is in the highway, in violation of a statute, does not necessarily make the owner liable for damages resulting from fright which the object may have occasioned to horses. There must have been some natural, causative connection between the violation of the statute and the frightening of the horses. The object, in the situation in which it was left, must have had a necessary or natural tendency to that end, according to common experience. A cow or a sheep may be upon a public highway in violation of a statute, and a horse of ordinary gentleness may take fright at such an animal. The frightening of horses was not, however, the mischief which the statute requiring certain animals to be restrained from running at large was intended to prevent. The injury must in each case be proximately such as was within the purpose and protection of the statute: *Wabash etc. R'y Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193. It was error to admit the evidence.

At the proper time, the defendant company asked the court to instruct the jury to the effect that the railway company had the right to have its cars standing on its branch road at any point except in or upon the highway, and that if the car at which the plaintiff's horses took fright was placed by it at a point so as not to obstruct the highway, and was afterwards moved into the highway by persons for whom the company

was not responsible, the company would not be liable to the plaintiff for the injury suffered by her, unless it negligently permitted the car to remain upon the highway an unreasonable length of time.

This was undoubtedly a correct statement of the law, and it was applicable to the defense which the defendant sought to maintain by its evidence.

It is the right of a party applying for it, to have his theory of the case clearly and distinctly presented to the jury, when he has adduced evidence fairly tending to support it: *Tenbrooke v. Jahke*, 77 Pa. St. 392; *Pittsburgh etc. R'y Co. v. Krichbaum*, 24 Ohio St. 119; *Comstock v. Norton*, 36 Mich. 277; Thornton Juries and Instructions, sec. 165.

The instructions given by the court, although correct in the abstract, were general. The defendant had a right to an instruction adapted to the special features of the defense which it undertook to support by its evidence: *Parkhill v. Town of Brighton*, 61 Iowa, 103; *Parmlee v. Adolph*, 28 Ohio St. 10; *Marietta etc. R. R. Co. Picksley*, 24 Id. 654.

For the foregoing reasons the judgment is reversed, with costs, with directions to the court to sustain the appellant's motion for a new trial.

EVIDENCE OF SIMILAR ACCIDENT IN HIGHWAY IS ADMISSIBLE, WHEN:
See *Phillips v. Town of Willow*, ante, p. 114.

LIABILITY FOR LEAVING OBSTRUCTIONS IN HIGHWAYS WHICH FRIGHTEN HORSES: See note to *Morse v. Richmond*, 98 Am. Dec. 609-612.

CASES
IN THE
SUPREME COURT
OF
IOWA.

BATHE v. DECATUR COUNTY AGRICULTURAL SOCIETY.

[78 IOWA, 11.]

ULTRA VIRES, PLEADING. — IN ACTION AGAINST CORPORATION TO RECOVER FOR INJURIES CAUSED BY NEGLIGENCE of alleged employees of the corporation, it must appear from the petition that the defendant had authority to enter into a contract of employment; otherwise it will be presumed that there is nothing in the articles of incorporation which either by express provision or by implication authorized the officers of the society to hire such servants, and therefore there can be no recovery against the corporation.

E. W. Curry, for the appellant.

S. A. Gates and Brother, and Bullock and Hoffman, for the appellee.

ADAMS, C. J. The petition shows that the defendant is a corporation, organized to further the interest of agriculture, to improve and encourage the breeding of fine stock, to hold expositions of agricultural products and stock, to hold and give annual fairs, and to do and perform everything necessary and incident thereto; that in the fall of 1885 the defendant held its annual fair at its fair-grounds in Decatur County, near the town of Leon; that, for the purpose of increasing the attendance and the gate receipts, the officers of the defendant employed one Clark and one Wilson to convey people in their own conveyances from the town of Leon to the fair-grounds; that Clark and Wilson, while so engaged, ran their team negligently against the plaintiff's mare, and caused her death. The defendant demurred to the petition, upon the ground,

among others, that it does not appear that the defendant had authority to employ Clark and Wilson, as alleged, and thereby assume responsibility for their conduct as employees.

The powers of a corporation are such as are expressly provided in the articles of incorporation, and such others as are reasonably incident to the exercise of such powers. The plaintiff contends that the employment of Clark and Wilson to convey people to the fair-grounds was incident to the holding of a successful fair, as there would be no fair without attendance. This might be conceded, if attendance depended upon conveyances provided by the defendant, and it was so understood by the members of the society at the time they joined it. But there is nothing in the petition which shows this to be so. In the absence of any showing to the contrary, we may assume that the members of the society joined it with the understanding that all persons desiring to attend the fair would be able to procure conveyances in their own way, and without any provision therefor by the society. Furnishing conveyances is a distinct business, in which any one might engage, and the presumption would be that the supply would be equal to the demand. In our opinion, then, there is nothing in the articles of incorporation, either by express provision or arising therefrom by implication, that authorized the officers of the society to employ Clark and Wilson. If this is so, the defendant never became responsible for their conduct, and the demurrer to the petition was rightly sustained.

Affirmed.

MUNICIPAL CORPORATION IS NOT LIABLE FOR UNAUTHORIZED ACT OF ITS OFFICERS, or for acts of persons assuming without authority to be such officers: See note to *Hilsdorf v. St. Louis*, 100 Am. Dec. 358-360.

BOCKENSTEDT v. PERKINS.

[73 Iowa, 23.]

LIABILITY OF SURETIES ON GUARDIAN'S BOND — EVIDENCE. — Sureties on guardian's bond are not responsible for any default which may have occurred before they signed the bond, but the undertaking covers money held by the guardian when the bond was accepted, and the fact that he had received it but six days before that has some tendency to prove that it was in his hands at that time, and is admissible.

ON APPEAL, FINDING OF COURT WILL NOT BE DISTURBED, where the action is at law, if there was any evidence which reasonably sustains it; therefore a judgment against sureties on guardian's bond will not be set aside,

although the only evidence on which it is based is, that money had been paid the guardian six days prior to the execution of the bond, and that it had not been accounted for.

APPEAL from judgment for plaintiff against sureties on guardian's bond. Trial was had before the court without a jury.

J. H. Peters and E. C. Perkins, for the appellant.

J. D. Alsop, C. D. Husted, and Powers and Lacy, for the appellee.

REED, J. W. A. Heath, the guardian on whose bond this action was brought, was appointed on the thirteenth day of October, 1875. A former guardian tendered his resignation of the trust on that day, which was accepted by the court, and he was ordered to turn over the estate of the wards to his successor. On the same day he paid to Heath the sum of \$1,566.90, which is all the property of the estate ever received by him. The bond sued on was not executed, however, until the 19th of October. Heath died without having accounted for the money, and it is for its recovery that the action was brought. The condition of the bond is, that Heath "shall faithfully discharge the office and trust of such guardian, and shall render a fair and just account of such guardianship from time to time, whenever required thereunto by law, and render and pay to said minors all moneys, goods, chattels, title papers, and effects which may come into the hands or possession of such guardian, belonging to such minors, when such minors shall be entitled thereto."

1. On the trial defendants objected to the evidence offered by plaintiff to prove the payment of the money to the guardian, on the ground that, as their only undertaking was that he would account for such property as should come into his hands after the execution of the bond, they were not responsible for his failure to account for the money, he having received it before that. It is true that defendants' undertaking was for the performance in the future of the duties of the guardianship. They are not responsible for any default which may have occurred before they signed the bond. But if Heath held the money when the bond was accepted, their undertaking covers it; for in contemplation of law, it came into his hands as guardian at that time. The order appointing him was made previous to that, it is true, but the duties of the trust did not devolve upon him until he qualified, which was

done when the bond was accepted. From that time they were responsible for his performance of the duties of the trust. Any competent evidence which tended to prove that he held the money at that time was admissible. The fact that he had received it but six days before that had some tendency to prove that it was in his hands at that time. The evidence of that fact was therefore admissible.

2. Plaintiff rested upon proof of the payment of the money to Heath, and that he had not accounted for it at the time of his death, which occurred in January, 1882. It was contended, however, that this did not show a default after the execution of the bond. But we have held that the fact that he received the money so shortly before the execution of the bond had some tendency to prove that it was in his hands when the bond was given. It has an equal tendency to prove that the default occurred later. The action is at law, and we will not disturb the finding of the court if there was any evidence which reasonably sustains it. Considering the short period of time which elapsed between the payment of the money to Heath and the execution of the bond, the presumption reasonably is, that he held it when the bond was accepted, and that the default occurred subsequently to that.

The finding of the district court on the question cannot therefore be disturbed.

Affirmed.

FINDINGS WILL NEVER BE DISTURBED UNLESS CLEARLY WRONG: See *Gabbert v. Jeffersonville R. R. Co.*, 71 Am. Dec. 358.

SURETY ON GUARDIAN'S BOND IS LIABLE for moneys in guardian's hands at the time of the execution of the bond, though received previously: *McDowell v. Caldwell*, 16 Am. Dec. 635.

JEFFRIES v. RUDLOFF.

[73 IOWA, 60.]

ATTACHMENT — PRACTICE — AMENDING RETURNS. — Liberal discretion is reposed in the court upon due notice to parties adversely interested to amend returns on process. A sheriff's return may be amended after as well as before his term of office has expired; nor is it a valid objection to such amendment that an action based on the return is pending against the sheriff; and such return may also be amended, although judgment has been rendered in the action, and nearly fifteen months have elapsed since the return was made.

APPEAL. — SUPREME COURT WILL NOT INTERFERE WITH FINDING upon ground that evidence does not support action of trial court in permitting sheriff to amend return.

ERROR MUST AFFIRMATIVELY APPEAR OF RECORD. The supreme court cannot presume error or pass upon question not so appearing of record.

Rollins and Frink, and L. A. Berry, for the appellant.

Warren and Buchanan, for the appellee.

SEEVERS, J. In January, 1885, the plaintiff commenced an action on a lease against the defendant, in which a landlord's attachment was issued. The attachment was placed in the hands of F. A. Eastman, who at that time was sheriff; and his deputy made return on the writ that he had attached certain property, among which was about "450 bushels of corn in the crib." Eastman's term of office expired in January, 1885, and in March thereafter the plaintiff obtained judgment in said action, and an order for the sale of the attached property. A special execution was issued on the judgment for the sale of such property, and the sheriff made return thereon that he had made diligent search for the property, but was unable to find it. In May, 1886, the plaintiff commenced an action against Eastman for such damages as he had sustained because Eastman had failed to "turn over and deliver to his successor in office the attached property." Eastman appeared, and obtained until the next or December term to answer, and the cause was continued. In May, 1886, Eastman filed a motion in the original action of *Jeffries v. Rudloff*, to amend the return on the writ of attachment so as to show "that the amount of corn in the crib was about 200 instead of 450 bushels, as stated in said return, and to further amend the return by stating therein the disposition that was made of the property levied upon." This motion was supported by affidavits. The court sustained the motion, and ordered that said "return be amended as prayed therein"; to which the defendant excepted.

1. It is contended by the counsel for appellant that the court erred in permitting the return to be amended, because the term of office of the sheriff had expired when the amendment was made. A liberal discretion is reposed in the court, upon due notice to parties adversely interested, to permit returns on process to be amended for the purpose of correcting mistakes; and the fact that the term of office of the sheriff had expired is not a valid objection to the exercise of this power. There is no reason why such amendment should not

be permitted after as well as before the sheriff's term of office has expired. The authorities are not entirely in accord on this subject; but in *Freeman on Executions* it is said: "But in nearly all the states a return may be amended after as well as before the sheriff has gone out of office." In support of this proposition, the author cites *Adams v. Robinson*, 1 Pick. 461; *Wilson v. Ray*, T. U. P. Charl't. 109; *Johnson v. Donnell*, 15 Ill. 97; *Newton v. Prather*, 1 Duvall, 100; *Keen v. Briggs*, 46 Me. 467; *Miles v. Davis*, 19 Mo. 408. See also *Murfree on Sheriffs*, sec. 879. These authorities support the stated proposition.

2. It is insisted that the court had no discretion in the premises, and should not have permitted the amendment to be made, because an action was pending against the sheriff based on the return. But this is not a valid objection. In *Freeman on Executions*, section 359, it is said that such is the rule in some states, but that "in the vast majority of states the rule is otherwise; and the pendency of a motion or action, instead of subverting the power of amendment, is the most frequent occasion in which the power is invoked." As supporting the text, the author cites *Hodges v. Laird*, 10 Ala. 678; *Niolin v. Hamner*, 22 Id. 578; *Gorham v. Hood*, 27 Ga. 299; *Trotter v. Parker*, 38 Miss. 473; *People v. Ames*, 35 N. Y. 482; 91 Am. Dec. 64; *Thomas v. Browder*, 33 Tex. 783; *Wardsworth v. Miller*, 4 Gratt. 99. These cases have all been examined, and they fully support the rule stated.

3. It is urged that a return of a sheriff cannot be amended by leave of the court after judgment in the action, because of the length of time that had elapsed. The return was made on the ninth day of March, 1885, and the motion for leave to amend it was made in May, 1886. The fact that judgment was rendered is immaterial as between the sheriff and the parties. Ordinarily the sheriff cannot be subjected to liability for a false return, or on the return if it is in accordance with the facts, until final judgment has been rendered in the action. The time within which a return can be amended cannot be limited. In the exercise of the discretion reposed in the courts, it is obvious they must be governed by the circumstances of each particular case. The length of time which had elapsed in this case was less than fifteen months. Such amendments have been allowed after the lapse of a much longer period. See the cases cited in the note to section 351 of *Freeman on Executions*. We do not think the court

abused the discretion with which it is invested in any particular. The return as amended relates back to the time when the original return was made. If, as it now stands, the return is false, the plaintiff can maintain an action against the sheriff on this ground. It is said that the evidence was not sufficient to justify the action of the court; but we cannot interfere with the finding for this reason. Besides this, the abstract does not contain all the evidence introduced in the district court.

4. It seems to be assumed by counsel that the sheriff asked and obtained leave to amend his return, so as to show that he had surrendered the corn to the execution defendant, on the ground that it was exempt; and counsel contend that it was not exempt because of a provision in the lease to the effect that all exemptions were waived. It will be observed that leave was asked to amend the return, so as to show the disposition made of the corn, and the motion was sustained; but the record fails to show what amendment was in fact made. It is apparent, therefore, that the question presented is not before us. We cannot presume error, but it must affirmatively appear. Besides this, we think the proper time to present such question will be in an action for a false return, if the property was surrendered as exempt when it was not.

Affirmed.

SHERIFF'S RETURN UPON PROCESS MAY BE AMENDED: *Ritter v. Scannell*, 70 Am. Dec. 775; *Kelly v. Gilman*, 61 Id. 648. So held as to return on attachment, in *Cody v. Quinn*, 44 Am. Dec. 75.

ERROR MUST AFFIRMATIVELY APPEAR OF RECORD: *Childs v. McChesney*, 89 Am. Dec. 545; note to *Wheeler v. Winn*, 91 Id. 196.

BOYLE v. MARONEY.

[73 IOWA, 70.]

ORDER DISCHARGING GARNISHEE ON EXECUTION IS NOT A BAR to an action upon the judgment, whereby it is sought to reach real estate, the title to which is in the garnishee, to whom it is alleged to have been conveyed in fraud of creditors. A garnishment proceeding under the Iowa Code, sections 2986 and 2988, is entirely distinct from and does not involve the same question as such action on the judgment, nor is it intended to reach real estate, or to warrant a money judgment for its value.

FRAUDULENT CONVEYANCE—EVIDENCE.—Circumstances may show that transaction amounted to a conveyance in fraud of creditors, although

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such conclusion is against the positive testimony of three witnesses, their stories being unreasonable, inconsistent with each other, and self-contradictory.

SHERIFF'S SALE. — CREDITOR'S RIGHT TO ISSUE EXECUTION AGAINST PROPERTY OF JUDGMENT DEBTOR TERMINATES AT DEBTOR'S DEATH, and in the absence of any order re-establishing that right, a sale and deed of such property under the execution are ineffectual for the enforcement of any right held by the creditor against the debtor.

FRAUDULENT CONVEYANCE. — JUNIOR JUDGMENT CREDITOR TAKES PRIORITY OVER THE SENIOR WHEN HE FIRST INSTITUTES PROCEEDINGS to recover property which the debtor has fraudulently conveyed away.

JUDGMENT LIEN ON LAND TERMINATES, under the statute of Iowa (Code, section 2882), where more than ten years have elapsed since its rendition, and where no steps have during that time been taken to preserve or revive such lien. A junior lien placed upon the land after the expiration of such time takes precedence, and the former judgment cannot then be revived by its owner so as to stand as the first lien.

ACTION in equity. Judgment for plaintiffs, appeal by defendants. Section 2986 of the code of Iowa provides that "a garnishee may, at any time after answer, exonerate himself from further responsibility by paying over to the sheriff the amount owing by him to the defendant, and placing at the sheriff's disposal the property of the defendant, or so much of said debts and property as is equal to the value of the property to be attached, all of which may afterwards be treated as though attached in the usual manner." Section 2988 relates to judgment in said process, and provides that if "it is made to appear" in any of the methods provided by the preceding sections of the code relating to garnishment "that the garnishee was indebted to the defendant or had any of the defendant's property in his hands, either at the time of being served with the garnishee notice aforesaid or at any time subsequent thereto, he is liable to the plaintiff, in case judgment is finally recovered by him, to the full amount of that judgment, or to the amount of such indebtedness and of the property so held by him, and a conditional judgment shall be entered up against him accordingly, unless he prefers paying or delivering the same to the sheriff as above provided."

Lake and Harmon, for the appellants.

C. E. Bronson and Charles E. Ransier, for the appellee.

REED, J. On the eighth day of November, 1876, plaintiff recovered a judgment against James and Mary E. Maroney for five hundred dollars, and one against James Maroney alone for sixteen hundred dollars. These judgments were

rendered in an action brought by plaintiff for the recovery of damages caused by the unlawful sale of intoxicating liquors to her husband. The petition in the action was filed on the tenth day of February, 1876, and the original notice was served on James Maroney on the same day, and on Mary E. Maroney on the 2d of May following. On the 1st of March, 1876, the Maroneys conveyed the real estate in question to defendant, Bridget Ryan. The title to the property at that time was in Mary E. Maroney. It had formerly been in James Maroney, but he had conveyed it, on the 4th of June, 1873, to Anthony McKerney, and Mary E. (who was his wife) joined in the conveyance. On the 16th of January, 1874, McKerney conveyed it to Mary E. Maroney, who, on the seventeenth day of April, 1875, conveyed it to Patrick McKerney, and he, on the 8th of June following, reconveyed it to Mrs. Maroney. On the 29th of October, 1874, a judgment was rendered in the district court in favor of the defendant Wallace Francis against James and Mary E. Maroney for \$1,150, and the property was sold on execution issued on that judgment, Francis being the purchaser, and he subsequently obtained a sheriff's deed therefor. The sale was on the 18th of November, 1882, and the deed to Francis was executed on the 20th of November, 1883. This suit was instituted on the 9th of April, 1877, but was not determined in the circuit court until December 6, 1886.

Mary E. Maroney died during the pendency of the action, and before the execution was issued on which the property was sold to Francis. After this suit was commenced, plaintiff caused execution to be issued on these judgments, on which the defendant Bridget Ryan was garnished. She appeared and answered, denying that she was in any manner indebted to either of the Maroneys, or that she had in her possession, or under her control, any moneys, property, rights, or credits belonging to them. She was examined fully touching the conveyance of the property in question to her, and the consideration paid by her for it. But no pleading was filed controverting her answer, and the court entered an order discharging her as garnishee. The ground upon which relief is demanded against her in this action is, that the property in fact belonged to James Maroney, and the conveyances by which the title to it was vested in Mrs. Maroney, as well as that by which it was conveyed to her, were without consideration, and were all made for the fraudulent purpose of cover-

ing the property from his creditors. In addition to her denial of the allegations of fraud, she pleaded the garnishment proceedings in bar, alleging that the order of discharge was an adjudication of the questions involved.

Francis was made a party to the action by an amendment to the petition which was filed in January, 1885. That pleading alleged the rendition of the judgment in his favor, the sale of the property, and the execution of the sheriff's deed to him; also the death of Mrs. Maroney before the issuance of the execution, and that no order of court was made for the sale of her property in satisfaction of the judgment before the writ was issued; and the prayer was for the setting aside of the sheriff's deed, and for general relief. The decree of the circuit court adjudges that the deeds under which Mrs. Ryan holds the title to the property are fraudulent, directs their cancellation, and subjects the property to sale in satisfaction of plaintiff's judgments. It also sets aside the sheriff's sale and deed under which Francis claims, but restores the lien of his judgment upon the property.

1. As to the matter pleaded in bar by the defendant Ryan: the order of the court discharging her as garnishee is not an adjudication of the questions here involved. All that can be claimed for the order is, that it determines that she was not indebted to the Maroneys, and that she did not have in her possession any property belonging to them which could be reached by the process of garnishment. It is doubtful whether in any case real estate belonging to the debtor, the title to which is in the garnishee, can be reached by that process. The general rule is, that it cannot: See Wade on Attachment, sec. 407; Drake on Attachment, sec. 465. Clearly this is so where the property has been conveyed in fraud of the rights of the creditor. The garnishee can be charged only in case it is shown that he is indebted to the defendant, or that he holds property belonging to him: Code, sec. 2988. But in that case the real estate does not belong to the debtor. The fraudulent conveyance, although void as to the creditor, divests the grantor of all interest in the property. The grantee is charged with no trust with reference to it, and it can be reached in his hands, and subjected to the judgment of the creditor's claim only in a proceeding in which the court can, by proper judgment, divest him of the title, and condemn the property to the satisfaction of the judgment against the debtor. That cannot ordinarily be done in a garnishment proceeding. The statute

(Code, sec. 2988) defines the extent of the power of the court in the rendition of judgment against the garnishee. It may render judgment against him for the amount of his indebtedness to the defendant, or the value of the property held by him. But he has the right in every case to exonerate himself before judgment, by paying the money to the sheriff, or by placing the property at his disposal: *Id.*, sec. 2986. He could not do the latter as to real estate the title to which is in him; for such property is at the disposal of the sheriff only when the one holding the title is divested of it, and that can be done only by conveyance, or the judgment of a competent court. He clearly cannot convey the property to the sheriff, and the provision is not capable of any interpretation under which he could be required to reconvey it to the grantor. It clearly was not the intent of the legislature that real estate so held should be reached by that process, or that one holding the title to it should be charged in the proceeding with a money judgment for its value. The questions involved in this proceeding, then, could not have been adjudicated in that. Nor was there any attempt to litigate them.

2. We do not deem it necessary to set out the evidence as to the fraudulent character of the transfers. It is sufficient to say that it clearly sustains the finding of the district court on that question. The property belonged originally to James Maroney. The conveyances by which the title became vested in his wife were all without consideration, and were made, as we are satisfied, for the purpose of covering it from the liabilities he was incurring in the unlawful business in which he was engaged. The conveyance to Mrs. Ryan was made soon after plaintiff's original suit was instituted, which was against both James Maroney and his wife. We are satisfied that it was without consideration, and was made for the purpose of covering the property from any judgment which might be obtained in that action. This conclusion is reached, it is true, against the positive testimony of both the Maroneys and Mrs. Ryan. But the circumstances of the transaction satisfy us that that was the real character of the transaction. Their stories are unreasonable, inconsistent with each other, and self-contradictory, and the ultimate conclusion which they seek to establish cannot be accepted.

3. We come now to the questions arising on the appeal of defendant Francis. It will be borne in mind that his judgment is against both James and Mary E. Maroney, and that

the title to the land was in Mary E. when that judgment was rendered. It therefore, as against her, became a lien upon the property, regardless of the character of the conveyances under which she held it; and when the conveyance was made to Mrs. Ryan, she took the property subject to that lien. If Francis had proceeded to sell it during the lifetime of Mary E. Maroney, the purchaser would probably have taken it discharged of any right or equity in the plaintiff. For, as the judgment was a lien against her, he had no occasion to institute any proceedings to subject it to his judgment as the property of James Maroney, but could have sold it as her property in satisfaction of the judgment. If he had taken that course, plaintiff's only remedy would probably have been to redeem from the sale. But he did not take that course. He waited until after her death, and then issued his execution, and sold the property. But his right to issue an execution against her property terminated at her death: *Welch v. Battern*, 47 Iowa, 147; and in the absence of any order or proceeding re-establishing his right, the sale and deed are ineffectual for the enforcement of any right which he held as against her. So far as his lien as against her is concerned, then, his condition was not changed by the sale and deed. But his right to enforce the judgment as against James Maroney continued. But, treating the sale as a sale of the property of that defendant, it is, as against plaintiff, unavailing, for the reason that the title was not in him. Regarding the sale, then, as having been made for the enforcement of the judgment against James Maroney, which is the only light in which it can be regarded, the case comes within the settled rule that when a junior judgment creditor first institutes proceedings to uncover the property which the debtor has fraudulently conveyed away, he takes priority over the senior: *Bridgman v. McKissick*, 15 Iowa, 260; *Howland v. Knox*, 59 Id. 46. The judgment setting aside the sheriff's sale and deed to Francis is therefore correct.

4. Plaintiff appealed from the provision of the judgment which re-establishes the lien of the Francis judgment against the property. She does not object to the establishment of the lien as against the other defendants, but claims that it should be made subordinate to her lien. And we think the claim must be allowed. The lien of that judgment, by limitation of statute, terminated before the rendition of the judgment in this case, more than ten years having elapsed since its rendition.

As defendant had at that time taken no steps to preserve or revive his lien, it cannot now be revived as against plaintiff. The judgment will be modified in that respect. In all other respects it will be affirmed.

EXECUTION ISSUED AFTER DEATH OF JUDGMENT DEBTOR, WITHOUT ANY REVIVAL, IS VOID: See *Elliot v. Knott*, 74 Am. Dec. 519; *Blanks v. Rector*, 88 Id. 780.

LIEN OF JUDGMENT WILL BE LOST IF NOT REVIVED before expiration of statutory period: See *Isaac v. Swift*, 70 Am. Dec. 698; *Lawson v. Jordan*, 70 Id. 596; and see note to *Trierson v. Harris*, 94 Id. 222-246, on the subject of *scire facias* to revive judgments.

THELEMAN v. MOELLER.

[73 IOWA, 108.]

EMPLOYEE CANNOT RECOVER FOR NEGLIGENCE OF CO-EMPLOYEE engaged in the prosecution of a common business, where the action is against employer.

WHO ARE FELLOW-SERVANTS — QUESTION OF FACT FOR JURY. — Employee who is charged with no other duty than to inspect machinery, in the operation of which injury occurs, is not a fellow-servant with the engineer. But if in addition to its care and inspection the employee is required to repair the machinery when broken or defective, and also to run the engine which propels it, he is a fellow-servant. In such case the issue as to whether the engineer was a fellow-servant, when the evidence tended to show that his negligence caused the injury complained of, should have been submitted to the jury, and a refusal of the court to do this constitutes error.

Heins and Hirschl, for the appellant.

Gannon and McGuirk, for the appellee.

BECK, J. The petition alleges that plaintiff was employed by defendant to operate a machine for sawing, and, while in the discharge of the duties of such employment, with due care, received an injury causing the loss of a hand; that the machine was negligently constructed and defective, and "defendant did not exercise due and reasonable care in keeping it in proper working order." Among other defenses, the defendant alleges in his answer, that if there was any negligence causing the injury, it was on the part of a co-employee of plaintiff in operating the machine, for which defendant is not, under the law, liable. The issue presented by this defense the district court failed to state to the jury, and gave no instruction as to the law relating thereto. The evidence tends to show that the machinery was in charge of an employee who

was the engineer and machinist of the manufactory. His duty required him to run the engine, and keep the saw and attachments and other machinery in proper order, and, in case any of the machinery was broken or became defective, to repair it. The evidence tended to further show that the injury resulted from a defective and worn-out rope, supporting a weight intended to keep the saw in place, which broke, permitting the saw to fly forward and strike the hand of plaintiff.

2. It is the rule of this court that an employee cannot, in an action against his employer, recover for the negligence of a co-employee engaged in the prosecution of a common business. But this rule does not extend to an employee who is charged with no other duty than to inspect the machinery, in the operation of which the injury occurs: *Brann v. Chicago etc. R'y Co.*, 53 Iowa, 595; 36 Am. Rep. 243. But the engineer, it will be seen from the statement of the evidence just made, was not confined by his duty to the mere inspection of the machinery. He had it in charge, was required to see that it was in good condition, and to repair it when broken or defective. These duties were not separated from the operation of the machinery. The engineer and plaintiff together operated it. The engine furnished the motive power propelling the saw, which did the work of sawing,—the very purpose for which both engine and saw were used. The saw could not be operated without the engine. The engineer was engaged in operating the saw. He was therefore a co-employee of plaintiff in the common business of both. It was not competent for the court to hold that the evidence fails to establish facts showing the relation of engineer and plaintiff. This was a question for the jury which should have been submitted to them with proper instructions. But the district court withheld the issue as to whether the plaintiff and engineer were co-employees from the jury. This was error, for which the judgment must be reversed.

Other questions in the case need not be considered.

Reversed.

EMPLOYEE CANNOT RECOVER FOR INJURY CAUSED BY NEGLIGENCE OF CO-EMPLOYEE, except under certain circumstances, which are stated in *Jones v. Old Dominion Cotton Mills*, 3 Am. St. Rep. 92, and note.

WHO ARE FELLOW-SERVANTS: See *Louisville etc. R. R. Co. v. Brooks's Adm'r*, 4 Am. St. Rep. 135, and note 142, and *Krogg v. Atlanta etc. R. R. Co.*, 4 Id. 79, and note 85, holding that where servants are not co-equals, one exercising supervision over the other, that they are not fellow-servants within the rule that the master is not responsible for the negligence of a fellow-servant.

ABRAHAM v. DAVENPORT.

[73 IOWA, 111.]

ORDINARY OFFICE FURNITURE OF A LAWYER IS EXEMPT FROM EXECUTION, and is covered by section 3072 of the Iowa Code, which provides that the proper tools, instruments, etc., of a lawyer shall be exempt, and where a landlord's attachment is issued and levied upon such furniture it should be discharged on motion.

APPEAL by defendant from order of court overruling motion to discharge landlord's attachment issued and levied upon office furniture.

John O. Malcolm, for the appellant.

Gleason and Haskell, for the appellee.

ADAMS, C. J. The defendant showed, in support of his motion, that he is the head of a family, and is an attorney at law, and engaged in the practice; that the property was in use by him as such attorney, and necessary to enable him to carry on his law business, and was purchased before the debt sued on was contracted.

Under section 3072 of the Code, the proper tools, instruments, and books of a lawyer, if the head of a family, are exempt from execution. The question presented is as to whether the ordinary office furniture of a lawyer necessary to enable him to carry on his business can, within the meaning of the statute, be deemed his instruments. We observe, for instance, that one of the articles attached is the defendant's office table. Strictly speaking, perhaps a table is not an instrument. Its general use is such that the word "instrument" seems inapplicable. But it should be borne in mind that a lawyer's table is used specifically in his employment; it is one of the things which he employs as a means in the accomplishment of his work. The fact that a table, in its general use, is not an instrument, is not important. It appears quite different when it is adopted specifically as a means in an employment. It then fulfills all the essential ideas of an instrument, and that unquestionably is the important consideration. It is the policy of the law that every man who is the head of a family shall be allowed, as far as possible, to follow his chosen vocation. It is better ordinarily, we presume, even for the creditor, that the debtor should not be deprived of the instruments of his vocation, and so turned aside to something for which he is unprepared, and which conse-

quently would be less remunerative. It is true that not everything with which the head of a family earns his living is exempt to him. Machinery is not exempt. It is proper that the exemption should be more limited. The creditor's rights must be considered as well as the debtor's. But the value to a lawyer of the ordinary office furniture which he uses in doing his work is so much greater than it can be to his creditors, that we think it comes within the spirit of the exemption statute, and that the court erred in not sustaining the defendant's motion for a discharge of the attachment.

Reversed.

EXEMPTION OF "TOOLS AND IMPLEMENTS," what articles are within: See note to *Kilburn v. Demming*, 21 Am. Dec. 545-553.

TAYLOR COUNTY v. KING.

[73 IOWA, 153.]

OFFICIAL BONDS. — Where a bond is delivered to third persons, who afterwards deliver it to the obligee, and such bond is not deposited as an escrow, it cannot be avoided by the sureties upon the ground that they signed the bond upon the condition that it should not be delivered unless it should be executed by other persons, who did not execute it, and that the ownership of more property should be qualified to, which was not done, when it appears that the obligee had no notice of such conditions, and there is nothing in the bond or the manner of its execution to put him on inquiry, and also that he has been induced upon the faith of such bond to act to his own prejudice; nor is there enough in the fact that it did not appear on the face of the bond that the sureties had qualified to the ownership of sufficient property to afford any warrant for the inference that the agreement alleged had been made, nor is the bond invalid on that account: Iowa Code, sec. 688.

ACTION upon bond given to the plaintiff county to recover for claimed default made by the treasurer of the county. Appeal by defendant sureties from verdict and judgment for the plaintiff.

G. B. Haddock, J. L. Brown, and Charles Thomas, for the appellants.

L. Evans, W. W. Morsman, and J. P. Flick, for the appellee.

ADAMS, C. J. The appellant sureties claim that the bond has no validity as to them, because, as they allege, the bond was signed with conditions, and not to be delivered until the conditions should be performed; the conditions being that

the signatures of other persons should be obtained, and that the persons signing the bond should qualify as the owners of property amounting in the aggregate to sixty-five thousand dollars, which was not done. It appears, we think, from the evidence, that the appellant sureties, after signing the bond, left it with one Johnson and one Dunlavey; that the understanding between them and Johnson and Dunlavey was, that it was to be delivered only after the conditions above mentioned had been performed; that the principal in the bond, however, procured the bond from them in violation of the understanding, and presented it to the board of supervisors, who approved it; that they did so, however, without knowledge of the conditions, and without knowledge that the same had ever been deposited with Johnson and Dunlavey for any purpose.

It is conceded by the appellants that, if they had delivered the bond to the principal with the same understanding, his delivery would be a good delivery, and the appellants would be precluded from setting up the fact that the bond was signed with conditions, unless they could show that the supervisors had knowledge of the conditions, or were put upon inquiry in respect to them. The law, indeed, is well settled, at least in this state, that in such case the sureties would be deemed to have clothed the principal with apparent power to deliver the bond: *Carroll County v. Ruggles*, 69 Iowa, 275. But it is said that the case is different where the sureties took the precaution to put the bond into the hands of a third person. To this, however, we have to say that it appears to us that Johnson and Dunlavey were the agents solely of the sureties, and if the bond was delivered in violation of the conditions upon which the sureties signed it, it was the fault of their own agents. The sureties selected untrustworthy persons, and the loss should not fall upon the county, who had had nothing to do with these persons.

If the supervisors had received the bond from Johnson and Dunlavey, it may be that they would have been charged with the duty of discovering what their powers were. But they received the bond from the very person who might be expected to deliver it, and who had the apparent power to deliver it. If we should sustain the appellants in their defense, no such bond could be safely accepted by a board of supervisors, though presented by the principal, until they had brought all the sureties before them, and ascertained from them upon

what conditions, if any, they had signed the bond; and if upon any, whether they had been performed.

In *Carroll County v. Ruggles*, above cited, this court said that the board of supervisors should not be required to compel the attendance of the sureties to official bonds to ascertain whether their names were affixed with conditions; that they do not, indeed, have the power to compel their attendance; and that, the time and place being fixed by law for the approval of such bonds, the board ought not to be expected to travel over the county to seek out and interview the sureties upon the subject of their obligations.

The appellants rely upon *Daniels v. Gower*, 54 Iowa, 319. That was an action upon a non-negotiable promissory note, which had been deposited by the surety with a third person, and which afterwards was obtained by the principal, and delivered by him in contravention of the terms imposed by the surety. It was held that the surety was not bound. But this court, as is seen in *Carroll County v. Ruggles*, *supra*, does not regard the ruling in *Daniels v. Gower*, *supra*, as applicable to a case like the present, arising upon an official bond whose acceptance and approval involve the discharge of an official duty at a fixed time and place. Besides, it is proper to say that the ruling in *Daniels v. Gower*, *supra*, was based in part upon the supposed authority of *Pepper v. State*, 22 Ind. 399; 85 Am. Dec. 430. But the latter case was not, in fact, an authority, because it had been overruled in *State v. Pepper*, 31 Id. 76 (87), which fact was not brought to the attention of this court. While the ruling in *Daniels v. Gower*, *supra*, is not without support, its correctness, in view of all the decisions bearing on the question, and of the principle involved, may be doubted.

In this connection, we ought to notice another case especially relied upon by the appellants, and that is *Smith v. South Royalton Bank*, 32 Vt. 341; 76 Am. Dec. 179. In that case, a bond and mortgage had been deposited with one Rolfe, to be delivered when certain conditions were performed. A delivery having been made without the performance of the conditions, it was held that the delivery was not valid. But the court in that case regarded the deposit with Rolfe of such a character that the instruments became escrows. Besides, it appears that when the instruments were delivered, it was known that they came from Rolfe's hands, who was a special agent; and it was held that, that fact being understood by the parties, the party to

whom the delivery was made should have inquired in regard to the extent of his powers.

The bond sued on is not, in our opinion, to be deemed an escrow, in the proper sense of the word. It was deposited with a third person by the obligors alone, and not by any agreement between them and the obligee. Nor did the plaintiff have any knowledge of the special agents, Johnson and Dunlavey; and there was nothing, so far as we can see, to put the board upon inquiry in respect to the obligation of the sureties. The correct rule seems to be expressed in *State v. Peck*, 53 Me. 284. The court said: "A bond perfect upon its face, apparently duly executed by all whose names appear therein, purporting to be signed, sealed, and delivered by the several obligors, and actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it upon the condition that it should not be delivered unless it should be executed by other persons who did not execute it, when it appears that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution; and also that he has been induced, upon the faith of such bond, to act to his own prejudice." See also, in this connection, *Dair v. United States*, 16 Wall, 1; *Deardorff v. Foresman*, 24 Ind. 481; *Nash v. Fugate*, 24 Gratt. 202 (208); 18 Am. Rep. 640; *Chicago v. Gage*, 95 Ill. 593.

One position of the appellants remains to be noticed. They claim that there was enough upon the face of the bond in suit to put the supervisors upon inquiry. The fact appears to be that the bond did not comply with the law, in that it did not appear that the sureties had qualified to the ownership of sufficient property. It may be added that some of the affidavits for the qualification of sureties had been partially prepared, but not executed. It is said that the board should have seen that the bond was not as the appellants expected it would be when it should be delivered. The bond, however, was not invalid by reason of its non-compliance with the law: Code, sec. 688. It may be that there was enough upon the face of the transaction to lead the board to the inference that the sureties expected that the aggregate amount of property to the ownership of which the sureties would qualify would be larger than it was, or that the bond would not be accepted. But there was nothing in this, we think, to lead to the inference that they had agreed that the bond should not be deliv-

ered until others had signed it, and the ownership of more property had been qualified to. Indeed, the stronger the expectation which the sureties might have entertained that the bond would not be accepted as it was, the less necessity would there seem to them to be for an agreement in respect to its delivery. Unless the board had reason to infer something more than a mere expectation on the part of the sureties, it was not, we think, put upon inquiry.

In our opinion, the judgment must be affirmed.

BOND SIGNED ON CONDITION THAT OTHER PERSONS SHOULD SIGN, but delivered by principal without the latter signatures, has been held to be valid if the obligee had no notice of such condition: *Carroll Co. v. Ruggles*, 58 Am. Rep. 223; *School Trustees v. Sheik*, 59 Id. 830; but the fact that more names appear in the body of the bond than are signed to it appears to have been regarded as notice: See *Pepper v. State*, 85 Am. Dec. 430, and note; *Ward v. Chum*, 98 Id. 749.

NATIONAL STATE BANK OF BURLINGTON v. MORSE, WILSON, & Co.

[73 IOWA, 174.]

DELIVERY OF MORTGAGE CANNOT TAKE PLACE WHEN THE MORTGAGEE HAS NO KNOWLEDGE THEREOF; and if a mortgage is filed for record without his knowledge, it must be held subordinate to attachments subsequently levied; and an acceptance of the mortgages by the mortgagees subsequent to the attachment levy does not relate back to the original filing so as to make the mortgage lien attach as paramount.

ACTION to obtain decree that certain attachment levies were paramount as liens over certain chattel mortgages held by defendants. Decree for plaintiff. Appeal by defendants.

John C. Power, Newman and Blake, George H. Lane, C. Marble, T. B. Snyder, John Greiner, H. F. Rohde, Thomas Hedge, and Theodore Guelich, for the appellants.

Hall and Huston, and P. Henry Smyth and Son, for the appellee.

ADAMS, C. J. The defendants Boesch and Son were doing business as merchants in the city of Burlington. They had become largely indebted to the plaintiff, and to a considerable number of personal friends for money borrowed to enable them to carry on their business. They had also become indebted to various persons for goods purchased. About the 15th of May,

1885, they decided to execute chattel mortgages upon their stock to their personal friends. In this they were actuated in part, no doubt, by motives of friendship, but in part also, we think, by the hope of being able to hinder and delay the plaintiff and their commercial creditors. Mortgages were accordingly drawn and filed for record. The next day the plaintiff caused a writ of attachment to be levied upon the stock. Several of the commercial creditors also brought actions, and levied upon the stock. It is contended by the plaintiff and the commercial creditors who acquired liens, that no one of the chattel mortgages was delivered until after the other liens had attached. The fact is, that while the mortgages were executed and filed for record before any of the other liens attached, the mortgagees had no knowledge at that time of the execution and filing of the mortgages, nor does it appear that they were executed and filed in accordance with a previous agreement. The delivery, then, did not take place until the mortgagees had knowledge of the execution of the mortgages and signified their acceptance thereof. On this point the evidence shows clearly enough that some of the mortgagees, before any attachment was levied, were informed by the mortgagors of the execution and filing of the mortgages, and that they replied that that was all right, or used words to that effect. This, it may be conceded, was sufficient to show acceptance, but for one fact, which remains to be stated. The mortgages were not executed to secure the indebtedness as it stood, all of which had matured, but new notes were drawn, to run for a year, and the mortgages purported to secure these notes. The notes, however, thus drawn, were not delivered, nor were the mortgagees informed of the fact that they differed from the old notes in that by their terms an extension of time was provided for. This provision was a material one. The makers of the notes were insolvent, and the security offered consisted of nothing but mortgages upon stock of goods, which would depreciate if not sold; and no provision was made for a sale unless the mortgagors should attempt to dispose of the goods or remove them out of the county. It is doubtful, to say the least, whether the mortgagees would have accepted the security if they had been informed of the provision for an extension. But it is not important to inquire as to what they would have done. It is enough to know that the transaction involved a material provision of which they were not informed. The minds of the parties did not meet. No person can be said

to agree to that of which he is ignorant. It is true that these creditors have now accepted the security, notwithstanding the extension involved. But circumstances have changed. Attachments have been levied, and they are glad to accept what they can get.

The important fact is, that we cannot find what in law amounts to an acceptance prior to the attachments. There are no preponderating equities in favor of either party. It is a mere question of legal right. The mortgagees contend that, inasmuch as the mortgages have been now accepted, the lien of the mortgages attached from the date of filing, and it is to be considered paramount to all attachments which have been made since filing. But in our opinion, the lien of the mortgages cannot be held to have attached until there was a delivery, and that did not take place until there was an acceptance: *Day v. Griffith*, 15 Iowa, 104; *Cobb v. Chase*, 54 Id. 253.

We think the decree must be affirmed.

REGISTRATION OF DEED BY GRANTOR IS MERELY PRIMA FACIE EVIDENCE OF DELIVERY, which may be explained or rebutted by testimony: *Wellborn v. Weaver*, 63 Am. Dec. 235. Assent or acceptance of grantee is necessary to valid delivery: *Hoffman v. Mackall*, 64 Id. 637; *Weber v. Christen*, 2 Am. St. Rep. 68.

HARKNESS v. WESTERN UNION TELEGRAPH CO.

[73 Iowa, 190.]

LIABILITY OF TELEGRAPH COMPANY FOR NEGLIGENCE — AGENCY. — UNDISCLOSED PRINCIPAL MAY SUE in his own name on contract made by agent, and is entitled to all its advantages and benefits. The fact that a telegraph company only contracted with the agent in sending a telegram, and had no knowledge that the plaintiff was in fact principal, is immaterial, except that it might set up as a defense any matters which occurred prior to disclosure of the principal which would constitute a defense in a suit by the agent.

NEGLECT IN DELIVERING TELEGRAM. — BURDEN OF PROOF is upon telegraph company to explain delay in not delivering message until three days after its agent receives same; and where no excuse is offered for the delay, the court is justified in finding that the company was negligent.

WHILE TELEGRAPH COMPANY MAY RESTRICT ITS LIABILITY, IT CANNOT CONTRACT against its own negligence in failing to transmit and deliver messages, nor limit a recovery for damages thereby sustained.

W. F. Thummel, for the appellant.

F. P. Greenlee, for the appellee.

SEEVERS, J. The material facts are that the plaintiff is a resident of the state of Iowa, and had a suit pending in the state of Nebraska, which it was expected would be reached for trial on the thirtieth day of October, 1884. W. C. Sloan, one of the plaintiff's attorneys, was a resident of the state of Nebraska, and A. M. Walters was also her attorney, who, however, was a resident of the state of Iowa. Both said attorneys were expected to take part in the trial of the suit. The plaintiff intended to start from her home in Iowa with her witnesses and attorney on the morning of the 29th of October, so that she could be present when the case was called for trial on the following day. During the night of the 27th of October a message was delivered to the defendant in these words:—

“FAIRMOUNT, NEB., October 5, 1884.

“To A. M. WALTERS, Villisca, Iowa: Do not come till November 5th. Court adjourned till then.

“W. C. SLOAN.”

Such message was a half-rate or night message, and Sloan paid the defendant forty cents for transmitting the same. The message was received at Villisca, October 28th, about one o'clock, A. M., at which place Walters resided, but was not delivered to him until October 31st. Plaintiff started to Nebraska on October 29th, with her witnesses and attorneys, and thereby incurred expenses, which she paid, and this action is brought to recover the same of the defendant, who had no knowledge for what purpose the message was sent, other than is disclosed on its face. Nor had the defendant any knowledge that Sloan was acting for the plaintiff, or that she had a suit pending in Nebraska. The contract was made with Sloan, and is attached to the message, the material portion of which is as follows:—

“(Form No. 45.)

“THE WESTERN UNION TELEGRAPH COMPANY.

“*Night Message.*

“The business of telegraphing is subject to errors and delays arising from causes which cannot at all times be guarded against, including sometimes negligence of servants and agents whom it is necessary to employ. Errors and delays may be prevented by repetition, for which, during the day, half-price extra is charged in addition to the full tariff rates. The Western Union Telegraph Company will receive messages, to be sent without repetition, during the night, for

delivery not earlier than the morning of the next ensuing business day, at reduced rates, but in no case for less than twenty-five cents toll for a single message, and upon the express condition that the sender will agree that he will not claim damage for errors or delays, or for non-delivery of such messages happening from any cause, beyond a sum equal to ten times the amount paid for transmission; and that no claim for damages shall be valid unless presented in writing within thirty days after sending the message."

1. It is objected that the court erred in rendering judgment for the plaintiff, because the message was neither sent by nor to her, and no contract was made with her. The court was justified in finding that both Sloan and Walters were the agents and attorneys of the plaintiff, and that the telegram was sent by one of them, and received by the other, for the use and benefit of the plaintiff. Therefore she may well be said to be an undisclosed principal, and in such case we understand the rule to be that such principal, as the "ultimate party in interest, is entitled, against third persons, to all advantages and benefits of such acts and contracts of his agents," and the principal may sue in his own name on the contract: *Story on Agency*, sec. 418; *National Life Ins. Co. v. Allen*, 116 Mass. 398; *Gage v. Stimson*, 26 Minn. 64. The fact that the defendant had no knowledge that the plaintiff was in fact principal, and that the telegram was sent for her use and benefit, is immaterial, except that it may be true that the defendant may set up as a defense any matters that would constitute a defense if the suit was brought in the name of the agent, which occurred prior to the disclosure of the principal.

2. It is insisted that the court erred in finding that the defendant was negligent in failing to deliver the telegram earlier than it did. It will be observed that the telegram was received by the agent of the defendant at Villisca, Iowa, on the morning of the 28th of October, and that it was not delivered until the thirty-first day of that month. The court was justified in finding that defendant was negligent, because no excuse whatever for the failure to deliver the telegram on the twenty-eighth day of October is given. The delay was such as to cast on the defendant the burden of explaining the cause of the delay.

3. It is insisted that the contract limits the liability of the defendant, and that the recovery cannot exceed such limit. It has been held that it is competent for a telegraph company to restrict its liability, as was done in this case, but that it cannot

contract against its own negligence in failing to transmit and deliver the message: *Sweatland v. Illinois etc. Tel. Co.*, 27 Iowa, 433; *Manville v. Western Union Tel. Co.*, 37 Id. 214; 18 Am. Rep. 8. But it is urged that the contract was made with Sloan, and that he can only recover the amount stipulated in the contract, for the reason that the money expended by him was the amount paid for the message, and that this is the extent of the plaintiff's recovery, for the reason that she is an undisclosed principal, and not known in the transaction. We do not concur in this proposition, but think that, as the telegram was sent and received for the benefit and use of the plaintiff, she may recover such damages as she has sustained, subject only to any payments in liquidation of damages made by the defendant to Sloan prior to the time defendant had knowledge that the telegram was sent for the use of the plaintiff, and that she was the principal in the transaction.

4. It is further insisted that the plaintiff recovered \$24.52 more than in any event she was entitled to. We deem it sufficient to say that we cannot concur in this proposition.

Affirmed.

UNDISCLOSED PRINCIPAL MAY SUE UPON AGENT'S CONTRACT IN HIS OWN NAME: See *Ruiz v. Norton*, 60 Am. Dec. 618.

BURDEN OF PROOF IN ACTION FOR BREACH OF CONTRACT TO DELIVER MESSAGE BY TELEGRAPH: See *United States Tel. Co. v. Gildersleeve*, 96 Am. Dec. 518, and note 528, where it is held that the burden is on the plaintiff to establish negligence.

WHILE TELEGRAPH COMPANY MAY RESTRICT ITS LIABILITY, it cannot contract against its own negligence: See *Smith v. Western Union Tel. Co.*, 4 Am. St. Rep. 126, and note 134.

MILLER v. CHAMBERS.

[73 IOWA, 236.]

RIGHT TO ACT AS PARTNER IS EXTINGUISHED by renouncing the partnership and opposing it. A party who so repudiates his contract of partnership has no interest or right to share in a judgment obtained by the other partner, especially where he actively assists the party against whom the recovery was had in opposing the claim.

C. C. Nourse and J. M. St. John, for the plaintiff.

Parson and Perry, for the defendant.

BECK, J. 1. The petition alleges that defendant orally agreed to become a partner with plaintiff in the business of

securing privileges for mining coal, prospecting for coal, and taking leases of coal lands; and subsequently the terms of the agreement were stated by defendant, in a letter to plaintiff, which need not be particularly stated here. It is alleged that business under this agreement was prosecuted, and certain privileges and options for mining were secured, and labor and money expended and debts incurred. A privilege to prospect upon lands owned by T. E. Brown was secured, and the parties entered thereon, and expended money and labor in prospecting. Brown, claiming that the plaintiff and defendants had abandoned the work, and surrendered all rights acquired from him, took possession of the land, and denied the parties the right to enter thereon and prosecute the business of prospecting. Thereupon defendant, in his own name, brought a suit against Brown to recover damages for his wrongful acts in preventing Chambers from sinking a shaft upon the land of Brown, and recovered a judgment for three thousand six hundred dollars in the action. Plaintiff alleges that this judgment is of the assets of the copartnership existing between him and defendant, which is denied by defendant, who refuses to account therefor as partnership assets. The plaintiff asks that this judgment be regarded as partnership assets, and that an account be taken of the partnership property and debts, and a decree be entered providing for the payment of such sums as may be found due him. The defendant denies the allegations of the petition.

The district court found the existence of the copartnership, and by decree settled the same, awarding to plaintiff \$682.75. Both parties appeal, the plaintiff complaining of certain allowances made in the settlement as stated in the decree, and the defendant denying plaintiff's right to recover any sum.

2. Many questions and points are discussed by the parties. We find it unnecessary to notice more than one, the determination of which, in view of the conclusion we reach, is decisive of the case. Plaintiff, as we have shown in the statement of the allegations of the petition, bases his claim to recover upon the ground that the matters for which defendant recovered the judgment against Brown belonged to the partnership. The evidence, it must be admitted, shows that they, under a mutual agreement, were to be equally interested in the leases and options acquired from Brown, and were to share in the expenses of prospecting for coal. It was agreed that they, with others, should form a joint company

to mine the coal, in which plaintiff and defendant were to have equal interests. The leases and prospecting were all in contemplation of such an organization, and no mining was to be done by them individually, or as copartners. The evidence clearly shows that, for reasons into which we need not inquire, there was a disagreement between plaintiff and defendant, and between Brown and defendant. Defendant went to Ohio, where he lived, intending to return and prosecute the business connected with prospecting and mining. Plaintiff, it appears, after defendant left, continued to prospect. He and Brown, uniting with others, formed a joint-stock company, and proceeded to sink shafts, and do other work preparatory to mining. They used the prospecting done by plaintiff under the agreement with defendant, taking possession of the land leased by Brown. All this was done for the corporation formed by plaintiff and Brown and their associates, defendant having no part therein. Defendant returned from Ohio, and proceeded to assert his rights. He found plaintiff prosecuting the work for the new corporation. He was chosen by that corporation its superintendent. He denied defendant's rights, and when defendant went upon the ground, ordered him away, and took steps to cause him to leave. Defendant then instituted the suit against Brown, the judgment rendered therein being the particular property which plaintiff seeks to reach in this action. In that suit plaintiff was active in opposing defendant's claim and in resisting recovery. He declares in his testimony that "it was an unrighteous act for Chambers to sue Brown"; and that he did everything he could to prevent Chambers recovering a judgment against Brown. There is no conflict in the testimony showing that plaintiff abandoned his connection with defendant, joined Brown in an enterprise which took from Chambers all rights, interest, and property which he had or could acquire under the agreement between him and plaintiff, and aided to the extent of his ability in defeating recovery by Chambers. His course was that of undisguised and active hostility to the very partnership under which he claims to recover in this suit.

A partner, by renouncing a partnership and opposing it, will be considered as having repudiated his contract with his partners, and will become as to them a stranger. He can no longer set up and enforce against them the contract which he by his acts denies. The law will regard him as he regards himself by his acts, not as a partner. but a stranger to those with

whom he was formerly associated. This doctrine is based upon the plainest principles of equity and justice. It is applied by the United States supreme court to a case not unlike the one before us. In that case the plaintiff's testator was a partner with two others in the practice of law. The partnership was engaged in prosecuting a claim. The testator quarreled with the claimant Lamar, and withdrew from the case, and denounced the claim as fraudulent to one of the judges privately. The other partners prosecuted the claim, and recovered. The plaintiff, as the representative of the recalcitrant partner, sought in the action to recover a share of the fees. The court, in recognizing the doctrine we have stated, used this language: "If, then, by abandoning the case, and denouncing it as fraudulent, he lost all the right which he had against Lamar, how can he claim from his copartners any of the compensation obtained for conducting the case, after his abandonment, to final success? His action was a breach of his duty to those partners, as well as of his obligation to Lamar. By the agreement of copartnership he had undertaken to share in the labor and to promote the common interests of the firm, and that was the foundation of his right to share in its earnings. It may be that mere neglect of his duty would not have extinguished that right; but a repudiation of his obligation, refusing to act as a partner, or to perform the functions of a partner, is quite a different thing. It may well be considered as a repudiation of the partnership. It was said in *Wilson v. Johnstone*, L. R. 16 Eq. 606: 'He who acts so as to treat the articles as a nullity, as it regards his own obligations, cannot complain if they are so treated for all purposes.' It may therefore very justly be held that by his action Hughes became a stranger to the case, and repudiated any relation he had previously held to it as a partner in the firm. The partnership ceased as respects that claim."

Under this doctrine, the law requires us to hold that plaintiff cannot be regarded as a partner of defendant, and therefore cannot recover in this action. This view of the case disposes of both appeals. Plaintiff can recover nothing; therefore we need not inquire into the correctness of the court's findings as to the amount of the recovery. The case will be affirmed, on plaintiff's appeal. Plaintiff's petition will be dismissed, and a decree to that effect will be entered in this court.

Reversed on defendant's appeal. Affirmed on plaintiff's appeal.

PARTNER CANNOT RELIEVE HIMSELF FROM LIABILITY AS SUCH by retiring from partnership without consent of his copartner: *Winston v. Taylor*, 75 Am. Dec. 112. But a partner, by repudiating the relationship, may be estopped from afterwards setting it up as against his copartners: *Wilson v. Johnstone*, L. R. 16 Eq. 606.

STATE v. KENDALL.

[73 IOWA, 255.]

TO RENDER ONE GUILTY OF ASSAULT WITH INTENT TO COMMIT RAPE, THERE MUST BE EVIDENCE of an intent to use whatever amount of force was necessary to overcome resistance and accomplish the purpose. It is not enough that defendant desired to have sexual intercourse with the prosecutrix, and that he committed a technical assault upon her person while urging his solicitations.

L. G. and L. A. Palmer, for the appellant.

A. J. Baker, attorney-general, for the state.

REED, J. The prosecutrix at the time of the transaction in question was about eighteen years old. The members of the family with whom she lived were away from home, and she was alone at the house. The defendant was an acquaintance of the prosecutrix, and a married man. He went to the house for a legitimate object, but finding her there alone, he entered into conversation with her. After talking to her for some time, he asked her to let him kiss her, but she answered that she was not in the habit of kissing married men. At that time the parties were outside of the house, but she immediately went into the house, and he followed her. He then seized her, and sitting down on the stairs, he drew her upon his lap. She remonstrated with him, but he assured her that he did not intend to injure her, and that he only wanted to talk to her. While he held her on his lap he placed one of his hands upon her bosom outside of her clothing, but she pushed his hand away. He then attempted to put his hand under her clothing, when she cried out, and broke away from him, and ran out of the house. He also went out, and a further conversation took place between them, in which he told her that different young men in the neighborhood had told him that any man could do as he pleased with her, and offered to give her five dollars if she would submit to him. She answered that he ought to go off and shoot himself, and that he ought to be ashamed to talk to her in

that manner. He did not offer her any other violence than as stated above, and the verdict of guilty was found upon the evidence of the facts as we have detailed it.

In our opinion, the verdict is not supported by the evidence. It is clear enough that defendant desired to have sexual intercourse with the prosecutrix, and it is probably true, also, that he committed a technical assault upon her person while urging his solicitations; but to render him guilty of the crime of assault with intent to commit rape, he must have intended to use whatever amount of force was necessary to overcome her resistance and accomplish his purpose: *State v. Hagerman*, 47 Iowa, 151. There was clearly no evidence of such intention. In its facts the case is no stronger than *State v. Canada*, 68 Iowa, 397.

Reversed.

ONE IS GUILTY OF ASSAULT TO COMMIT RAPE if he lays hold of a woman with the intention of having sexual intercourse with her against her will: *State v. Hartigan*, 78 Am. Dec. 609; *State v. Cross*, 79 Id. 519, and note 524.

PEDEN v. CHICAGO, ROCK ISLAND, AND PACIFIC RAILWAY COMPANY.

[73 IOWA, 328.]

RAILROAD. — WHETHER PROVISION IN DEED IS CONDITION SUBSEQUENT OR A COVENANT depends upon intent of parties, and such provision will, if there is any reasonable doubt as to what was intended, be held to be the latter.

CONDITIONS SUBSEQUENT ARE NOT FAVORED IN LAW, AND ARE ALWAYS STRICTLY CONSTRUED, since they tend to destroy estates. Therefore a deed to a railroad company of a right of way, which contains, as a part of the consideration, the provision that "the water . . . be made to run" in a certain place, will be construed to be a covenant attached to the land.

RAILROAD — WHO MAY BRING ACTION FOR BREACH OF COVENANT AS TO WATERCOURSE. — Where railroad company erects as a permanent structure upon land, of which it holds only the right of way, a culvert which diverts a watercourse, in breach of a covenant running with the land, the damages are original. The right of recovery therefor arises at once, and accrues in favor of the one who owned the premises at the time; and a conveyance of the fee after such breach does not operate as an assignment of the right of action to the grantee.

ONE Joseph Peden, on March 15, 1871, conveyed to the Chicago and Southwestern Railroad Company a right of way over land owned by him at that time, upon which land the

company constructed a railroad. A consideration of one dollar was named in the deed; and it also provided that "the water on the southeast side of the road be made to run on same side of road, instead of through the cattle-guards." The company so constructed this part of its road that the surface water collected and ran on the southeast side of the track to a creek, except on occasions when there was a heavy rain-fall, at which times it ran over the track and upon the lands on the opposite side. The road was sold to the defendant in 1875, and was thereafter operated by it. Joseph Peden deeded the land to James M. Peden, the plaintiff, in 1878. After the sale of the railroad to the defendant, but before the land was conveyed to the plaintiff, a wooden culvert was constructed and a cattle-guard opened, so that the water was afforded a passage-way, through which it flowed upon and over the plaintiff's land, instead of being confined to the southeast side of the track, thereby causing the alleged injury to the plaintiff's land and growing crops, to recover damages for which this action was brought. It further appeared that, after the sale of the land to the plaintiff, the defendant built a stone culvert, much larger than, and in place of, the wooden culvert. From a verdict and judgment for the plaintiff the defendant appealed.

Thomas S. Wright and S. S. Carruthers, for the appellant.

Paine and Eichelberger, for the appellee.

REED, J. 1. Appellant claims that the provision in the deed is a condition subsequent, and being a condition in deed and not in law, the right to take advantage of the breach rests alone with him who created it, and the estate to which it attaches. But the district court ruled that the provision is an independent covenant. This ruling is correct. As conditions subsequent tend to destroy estates, they are not favored in law. They are always strictly construed. And if it is reasonably doubtful whether a provision in the conveyance was intended as a condition subsequent or a covenant, the breach of which may be compensated in damages, it will be held to be the latter. But looking at the language of the present provision, and the objects which the parties had in view in the whole transaction, we think there is no doubt that it was intended as a covenant, rather than a condition attached to the estate. There is nothing in the language made use of which indicates that it was the intention that the estate con-

veyed should revert on the failure of the grantee to do the thing stipulated for; nor was there anything in the circumstances of the transaction indicating that such was their intention. The railroad company sought to acquire the land for use in connection with other lands, as a right of way for a line of railroad hundreds of miles in length, and the grantor conveyed it to them for that purpose.

The thing stipulated for was to be done after the road should be constructed. But when that was done, the land conveyed by the grant became a part of the road, and its forfeiture would involve a material change in the line of the road, which could only be accomplished by a great expenditure of money. Surely the parties had no such result in view when they inserted the provision in the deed. The provision is very different in its terms from the one involved in *Close v. Burlington etc. R'y Co.*, 64 Iowa, 149. In that case, the conveyance was of a strip of ground to be used for depot purposes, and the deed recited that it was made in consideration of one dollar and the permanent location of a depot on the ground. We held that this was not a promissory undertaking by the grantee to maintain a depot on the ground for all time, but was a condition of the grant, for the breach of which the remedy of the grantor was to declare a forfeiture. In that case, by the language made use of, the grant is upon the conditions named. The land was conveyed for depot purposes, and upon condition that it should be so used. But in this, the stipulation is as to a matter independent of the grant, and of the use to which the land was to be devoted.

2. The district court also ruled that the covenant is attached to the land, and that defendant is responsible for such injuries as are the consequence of its own acts in violation of the agreement. The covenant is an agreement by the covenantor that it will, for all time, maintain its railroad and appurtenances on the land in such condition that the surface waters accumulating on one side shall be prevented from passing over onto the land on the opposite side. It concerns, then, both the land conveyed by the deed and that retained by Peden, and it formed part of the consideration for which the lands were parted with. Mr. Washburn states the rule on the subject established by the authorities in the following language: "Such covenants, and such only, run with the land, as concern the land itself, in whosoever hands it may be, and form part of the consideration for which the land, or some interest in it, is

parted with, between the covenantor and the covenantee": 2 Washburn on Real Property, 298.

3. The district court gave the following instruction: "If you find that the culvert was intended to be and become a permanent part of the road-bed, then you are instructed that a right of action accrued to Joseph Peden while he was the owner of the land, if his land was injured by reason of water flowing through said culvert, at the time he suffered the first injury; and in such action he would be entitled to recover for all the damages he would sustain in the future, and he could maintain but the one action. But he would not be under any legal obligation to commence such action at once. The law would give him five years from the first injury in which to commence it, if he should own the property for that time. If you find that Joseph Peden conveyed the land to the plaintiff before the five years expired, then the plaintiff would have any balance of the five years remaining in which to commence an action for any damages he sustained after the land became his, but his right to commence an action would expire with the expiration of the five years. As it is admitted that this action was not commenced within five years from the time said culvert was put in, you are instructed that plaintiff is not now entitled to recover anything for any damages he may have sustained by reason of water flowing through said first-constructed culvert, if you find that said culvert was a permanent part of said road-bed."

It appears to us that this instruction announces two propositions that are in conflict. By the last clause the jury were told that if the culvert originally constructed was a permanent part of the road-bed, plaintiff could not recover, for the reason that the action was not commenced within five years after it was put in. In the preceding part of the instruction they were told that if it was a permanent part of the road-bed, then a right of action accrued to his grantor when the first injury occurred for all the damages which he would sustain in the future, in consequence of its construction, and that he could commence his action at any time within five years if he continued to own the land; but that, if plaintiff purchased the land before the expiration of five years after its construction, he could maintain an action for the recovery of such damages as he sustained after his purchase, provided he brought the same before the expiration of the five years. Standing alone, this latter proposition is, that plaintiff may recover for injuries to the land after his purchase, if he brought his action before

the expiration of the five years, even though the culvert was a permanent part of the road-bed. But this is clearly in conflict with the last proposition in the instruction. It is also clearly erroneous. If the culvert was a permanent structure, the damages are original. The right of recovery for all damages which may occur to the premises arose at once: *Powers v. City of Council Bluffs*, 45 Iowa, 652; 24 Am. Rep. 792; *Stodghill v. Chicago etc. R'y Co.*, 53 Id. 341. And the right accrued in favor of the one who owned the premises at the time, and the conveyance of the property to plaintiff did not operate as an assignment to him of the right of action.

It is insisted that the court erred in submitting to the jury the question whether the culvert as at first constructed was a permanent part of the road-bed. But that clearly is a question of fact. As we reverse the judgment on the ground pointed out, we will not now consider the question whether the verdict of the jury is sustained by the evidence.

Reversed.

CONDITIONS SUBSEQUENT ARE NOT FAVORED IN LAW: *Rawson v. School District*, 83 Am. Dec. 670, and note; and deed will not be construed as creating an estate upon such condition, except when the terms of the grant will admit of no other reasonable construction: *Raley v. Umatilla County*, 3 Am. St. Rep. 142, and note; *Emerson v. Simpson*, 82 Am. Dec. 168, and note. For instances of deeds held to create estates upon condition subsequent, see note to *Farnham v. Thompson*, 57 Am. Rep. 63-68.

DAMAGES FOR INJURIES ARISING FROM CONSTRUCTING AND MAINTAINING A RAILROAD IN AN IMPROPER OR INADEQUATE MANNER: See *Ohio etc. R'y Co. v. Wachter*, ante, p. 532, and note 537.

McARTHUR v. HOME LIFE ASSOCIATION.

[73 IOWA, 336.]

LIFE INSURANCE COMPANY IS ESTOPPED FROM DENYING AUTHORITY OF ITS AGENT, where it issues a policy of assurance upon an application procured by him, and receives from the assured, up to the time of his decease, all the dues and assessments, payable to the company under the policy.

FRAUD OF LIFE INSURANCE AGENT BINDS COMPANY, AND HE ACTS WITHIN SCOPE OF HIS AUTHORITY, where, having been duly authorized as agent to fill up application, he fraudulently and falsely misstates material facts therein and in the medical certificate, and also makes material alterations in the policy itself, of which acts neither the assured nor the company have any knowledge.

Newman and Blake, for the appellant.

Antrobus and McArthur, for the appellee.

SEEVERS, J. The trial was to the court, and the following are the facts found by the court: "That on the seventh day of June, 1882, one George W. Hair, claiming to act as agent for the defendant, applied to decedent, A. Wooline, to take out a policy of insurance on his life in defendant company; that said Hair, through B. A. Bailey & Co., district agents of defendant's company, forwarded the application to the defendant, with his name indorsed as agent thereon; that on the twelfth day of June, 1882, defendant issued a policy to decedent on said application for the sum of three thousand dollars, by the terms of which defendant undertook and agreed, upon proper proof of his death, to assess each member of class B, in which he was insured according to the policy held by each in division B, then in force, and to pay over the amount so collected, less cost of collection, to the legal heirs of the assured, which policy was delivered to decedent by the duly authorized agent of defendant; that decedent paid all his dues and assessments on said policy, according to its terms, up to February 16, 1885, on which day he died; that in April, 1885, proofs of his death were filed with the defendant in regular form, and thereupon the defendant made an assessment as stipulated in the policy, and realized therefrom the sum of \$455.50, which was all they were able to collect on said assessment, which it now holds subject to the decision of this court; that the application upon which the policy was issued was filled up by said Hair; that said decedent, in reply to the question as to the date of his birth, stated that he was born on the twenty-fifth day of December, 1816; but that said Hair falsely stated it in said application as December 25, 1846, but, in reading the answer to decedent, read it as December 25, 1816; that decedent had no knowledge that the date of his birth was falsely stated in said application; that the policy issued to decedent stated that his age was thirty-six; that said policy was changed by said Hair after it was received by him, and before he delivered it to decedent, so as to represent his age as sixty-six, of which change decedent had no knowledge; that the pretended examination of the applicant by a physician, and indorsement on the application, was forged by said Hair without decedent's knowledge, and that in fact no physician's examination was ever made; the

defendant had no knowledge of the false statement of the age of the applicant, or of the forging of the physician's certificate, or of the change of the age on the policy, until after the death of the assured; that the true age of the decedent appeared in the proof of death, which was received before the assessments were made; that under the rule of defendant company no policy was to be issued to any person over sixty years of age; that sometimes applications taken by said Hair were sent by him directly to the company, and that policies were sometimes sent by the company directly to him for delivery, but that this particular policy was sent to Hair through B. A. Bailey & Co., district agents of defendant, by whom Hair was employed to take applications for policies. I further find that the assessments made under the policy were made upon the basis of the age of thirty-six, which was only one half the assessment due upon policies issued to parties over fifty-six, the amount in the first case being one dollar, and upon the second two dollars. I find that the policies contain the following provision, it being the only one relating to the authority of the agent, and there is no other evidence as to the authority of the agent Hair, except such as is found by the court in said clause of the policies. The said clause reads as follows: 'No. 7. The authority of the agent ends with sending in the application and delivering the policy, and he has no authority to collect assessments or annual dues; nor has the agent any authority to waive forfeiture, or change in any way whatever any of the conditions, provisions, or stipulations of this policy; and nothing shall be intended or deemed a waiver or a forfeiture or a change of the terms and conditions of this policy, on the part of the association, unless indorsed by the president or secretary thereon.' "

1. Was Hair the defendant's agent? The court found that he claimed to be acting in that capacity, and that he forwarded the application upon which the policy issued to the plaintiff through Bailey & Co., and that Hair's name was indorsed upon such application as agent. The defendant knew, when it accepted the application and issued the policy, that Hair, claiming to act as its agent, had procured the application, and the defendant thereafter received from the assured all of the dues and assessments due the company, according to the terms of the policy, for the period of nearly three years. Having received and enjoyed all the benefits of Hair's acts, the defendant cannot now be permitted to say he was not its

agent: *Eadie v. Ashbaugh*, 44 Iowa, 519; *Milligan v. Davis*, 49 Id. 126.

2. Is the defendant bound by what its agent did when acting within the scope of the authority with which he was invested? We think this must be so. Hair, as it must be presumed he was authorized to do, filled up the application, and therein he falsely stated the age of the assured; and of this fact neither the assured nor the defendant had any knowledge. This clearly was a fraudulent act. But as Hair, at the time, was acting within the scope of the authority with which he was invested, the defendant is bound by the fraud of its agent: 1 *Parsons on Contracts*, 73, 74; *Davis v. Danforth*, 65 Iowa, 601; *Bank of California v. Western Union Telegraph Co.*, 52 Cal. 280; *Jewett v. Carter*, 132 Mass. 335. The same rule must prevail as to the medical certificate which was forged by Hair, and such is true as to the material alterations made on the face of the policy by Hair. It will be observed that the policy was intrusted to Hair for delivery to the assured, and that while it was in his possession, and before it was delivered, Hair fraudulently and materially changed it. It cannot be fairly said that Hair was a stranger to the parties or transaction, as counsel for the defendant contend. Counsel further claims that whoever deals with an agent is bound to inquire as to the extent of his authority. That such is the general rule, where a person contracts with an agent for a known principal, will be conceded; but whether it applies with full force when the agent commits a fraud on both his principal and the party contracted with, may be doubted, for the reason that it cannot be presumed that a fraud will be committed. But be this as it may, Hair, in transacting the business of the defendant, was authorized to fill up the application in accordance with the facts stated to him by the assured. He therefore was acting within the scope of the authority with which he was invested, and this is true as to the delivery of the policy. The medical certificate was an essential part of the application. In performing the business of the defendant, Hair perpetrated a fraud, and the fact that he did so without defendant's knowledge is immaterial.

The judgment of the circuit court is right, and must be affirmed.

INSURANCE COMPANY IS BOUND BY ACT OF ITS AGENT in filling out policy, if it allows him to hold himself out as having general powers, and it is estopped

to afterwards set up the fraudulent misstatement of facts in the policy, if the insured had no knowledge of such fraud: See *Bartholomew v. Merchants' Ins. Co.*, 96 Am. Dec. 65, and note; *Wilson v. Minnesota etc. Ins. Co.*, 1 Am. St. Rep. 659, and note.

SEARLE v. HILL.

[73 IOWA, 368.]

SPECIFIC PERFORMANCE OF PAROL EXECUTORY CONTRACT FOR ASSIGNMENT OF PATENT RIGHT may be enforced; a parol assignment is valid, and is not forbidden by section 4898 of the Revised Statutes of the United States, which provides that patents "shall be assignable in law by an instrument in writing."

Bolton and McCoy, for the appellant.

John F. Lacey, and Searle and Scott, for the appellees.

REED, J. There is no controversy as to the facts in the case. The parties each owned an interest in a patent right covering a window blind; plaintiffs' interest covering certain states and territories, and defendant's covering certain other states and territories. They were desirous of procuring a patent on a device that was regarded as an improvement on the article covered by the original patent, and it was agreed that defendant should proceed to Washington city, and prosecute an application for said patent, and that plaintiffs should pay one half the expenses incident to the application, which it was agreed would include the fees of the patent-office, and of the attorney who should be employed to prosecute the application, and defendant's personal expenses and salary while engaged in the business. It was also agreed that the letters patent should be taken, if procured, in defendant's name, and that he would thereafter assign to plaintiffs the interest therein covering the states and territories which are covered by their interest in the original patent. Defendant did proceed to Washington, and caused an application for the patent to be made and prosecuted, and the letters patent were issued in his name. Plaintiffs paid the proportion which they agreed to pay of the cost and expense of procuring the patent, but defendant refuses to assign to them any interest in the right, and it is to compel a specific performance of the contract that this action is prosecuted. It is shown that defendant is now insolvent. The question arising on these facts is, whether a court of equity can afford the remedy which is sought in the action. It is provided by statute (R. S. U. S., sec. 4898) that patents "shall be assignable in law by an instrument in

writing," and it is contended that the agreement of the parties is incapable of enforcement because it was in parol. But that does not follow. The provision merely prescribes the means or instrument by which the title may be passed. It does not forbid the making of a parol executory contract for the sale of the property. Such contract can be performed, it is true, only by executing the prescribed instrument. But it occurs in many cases that the parol agreement of a party is enforceable when the thing contracted for can be done only by executing a writing. A party contracts by parol for the sale and conveyance of real estate, and receives the stipulated price. The title can be passed to the purchaser only by a written conveyance. Courts of equity have always afforded relief in such cases by compelling the execution of the conveyance. Defendant's agreement was, that he would execute the written instrument requisite to pass to plaintiffs the interest contracted for. The object of the suit is to compel him to do that thing. The judgment commands him to perform his undertaking by executing and delivering the conveyance. He may be compelled by process of contempt to obey the mandate, or the conveyance may be executed in his name by the commissioner appointed by the court. The validity of a parol assignment of a patent, as between the parties, has frequently been determined by the courts: *Burke v. Partridge*, 58 N. H. 349; *Springfield v. Drake*, 58 Id. 19; *Pitts v. Whitman*, 2 Story, 609; *Blakeney v. Goode*, 30 Ohio St. 350. In *Binney v. Annan*, 107 Mass. 94, 9 Am. Rep. 10, a specific performance of an executory contract for the assignment of a patent was decreed. In that case the agreement was in writing, it is true, but it was for the assignment of the patent, and was executory. If an agreement, when in writing, is enforceable, we know of no such reason why a similar agreement in parol may not be enforced. It was held in *Ager v. Murray*, 105 U. S. 126, that a patent right may be subjected by bill in equity to the payment of a judgment debt of the patentee. In such case the conveyance to the purchaser would be executed by an officer or commissioner of the court. The case is important as declaring the power of the court to direct the execution of the instrument necessary for the transfer of the title. We think the judgment is well sustained by reason and authority.

Affirmed.

STATE COURT MAY ENFORCE CONTRACT BETWEEN RESIDENTS TO ASSIGN PATENT RIGHT: *Fuller v. Bartlett*, 60 Am. Rep. 838.

ECK v. SWENNUMSON.

[73 IOWA, 423.]

MORTGAGEE CANNOT ACQUIRE TAX TITLE, AND THEREBY DEFEAT MORTGAGOR'S TITLE, and the same rule applies to one who holds under the mortgagee. The tax sale operates as payment of the taxes.

EQUITABLE action to set aside a tax deed, and to quiet title. From a judgment for plaintiff the defendant appealed.

A. C. Boylan, for the appellant.

Hiram Shaver, for the appellee.

REED, J. On the 27th of May, 1878, Ole J. Overwold, who was then the owner of the premises in controversy, executed to S. Swennumson a mortgage to secure an indebtedness of twelve hundred dollars. On the 30th of March, 1881, Swennumson recovered a judgment against Overwold foreclosing said mortgage, and on the same day he assigned said judgment to plaintiff. In February, 1885, plaintiff caused the premises to be sold on special execution issued on such judgment, and bid them in for the amount of the indebtedness, and costs; and on the 7th of April, 1886, the sheriff executed a deed to him under said sale. On the 10th of November, 1879, the property was sold by the county treasurer for the delinquent taxes of 1878, and was bid in by Swennumson; and on the 23d of March, 1883, he assigned the certificates of purchase to John J. Swennumson, to whom the treasurer gave a deed on the 13th of September, 1884; and he subsequently gave to defendant a conveyance of the premises.

It will be observed that S. Swennumson was the owner of the mortgage when he bid in the premises at tax sale, and that he still held the certificates of purchase when he assigned the judgment of foreclosure to plaintiff. One of the grounds upon which plaintiff demands relief against the tax deed is, that as Swennumson had the right to pay the taxes for the protection of his security, his purchase at the tax sale should be regarded merely as a payment of them, made for that purpose, and consequently neither he, nor any person holding under him, could acquire title under the certificates; and we think this position should be sustained. It was held in *Fair v. Brown*, 40 Iowa, 209, and *Garrettson v. Scofield*, 44 Id. 35, that a junior mortgagee cannot, by bidding the property in at tax sale, acquire title, and thereby defeat the senior mortgage; and in the former case it is said that he cannot by that means

acquire title as against the mortgagor. The ground of the holding is, that as the party had the right to pay the taxes for the protection of his security, it would be inequitable to permit him to acquire title by purchasing the property for the delinquent taxes, and thereby defeat the lien of the senior mortgage, and cast upon the mortgagor the weight of both his own and the senior lien. Plaintiff's equities are equally as strong as would be those in favor of a senior mortgagee or the mortgagor. He in fact stands in the place of the latter, for by his purchase under the foreclosure he acquired all his estate and rights in the land.

The judgment of the district court will be affirmed.

MORTGAGEE CANNOT SET UP TAX TITLE ACQUIRED BY HIM AGAINST THE MORTGAGOR: See *Mills v. Tukey*, 83 Am. Dec. 74; nor can one who holds under the mortgage: See note to *Wilson v. Jamison*, 1 Am. St. Rep. 637, 638.

HARMS v. PALMER.

[78 IOWA, 446.]

A REDEMPTION BY THE MORTGAGOR'S GRANTEE, OF PROPERTY SOLD UPON EXECUTION, based upon a decree of foreclosure for part of the debt, divests the property of a judgment lien for the remaining part of the mortgage debt, although had the judgment debtor himself redeemed, all the judgments against him which would be liens upon the property if it had not been sold upon execution would be liens after redemption.

EQUITABLE action for relief against execution sale of land.
Appeal by defendant.

Nagle and Birdsall, for the appellant.

Williams and Baker, for the appellee.

ADAMS, C. J. The execution in this case was issued upon a judgment rendered in favor of the defendant, Palmer, against one Harm S. Harms. The property levied upon, however, belonged to the plaintiff, Wobkelina Harms. So far there is no controversy. The controversy arises out of the fact that, at the time the defendant's judgment was rendered, the property belonged to the judgment debtor. The plaintiff acquired title by purchase and conveyance from him, after the rendition of the judgment. The defendant contends that the lien of the judgment was in force upon the property after it passed into the plaintiff's hands. The plaintiff contends that it had been divested by reason of an execution sale.

The fact is, that this property had been mortgaged to secure certain promissory notes. On a part of the notes one Morton obtained judgment and a decree of foreclosure. On others of the notes, which by their terms matured later, the defendant obtained judgment and a decree of foreclosure. Morton sold under his decree, and bid in the property for the amount of his judgment; and the plaintiff, as grantee of the judgment debtor, redeemed from Morton. In our opinion, the property became divested of the defendant's lien.

The question presented has been substantially ruled upon several times. The purchaser of property from a judgment debtor, which has been sold upon execution, has the same right of redemption which the judgment debtor had. He may redeem by paying the amount for which the property was sold, with interest. The result of his redemption, however, is not the same as if the judgment debtor had made no sale and conveyance, and had made redemption himself. In such a case, of course, all the judgments against him, which would be liens upon the property if it had not been sold upon execution, would be liens after redemption. He would sustain the same relation to the land that he would to any other land which he might own in the same county. If Harm S. Harms had not sold and conveyed the land in controversy, but had himself redeemed, the defendant's judgment would have been a lien upon the property, and could have been enforced against it. The case is different in respect to the plaintiff, a grantee of the judgment debtor. The defendant's judgment was for a part of the same mortgage debt upon which Morton's judgment was rendered. The sale under Morton's judgment exhausted the property so far as that mortgage debt was concerned. It had been sold for all that Morton or the defendant was willing to give for it. It was probably sold for too little. We must assume, indeed, that the right of redemption was valuable, because it was sold, and the purchaser effected redemption. If it was impracticable for the judgment debtor to avail himself of the right on account of the balance of the mortgage debt due by judgment against him, his only resource was to sell his right of redemption for what he could get. The defendant has no reason to complain that he is not allowed to follow the land. He should have bid at the execution sale until the property brought its full value, and claimed a lien upon the balance of the proceeds after the payment of Morton. This court has persistently refused, as will

be seen by the later decisions respecting judgment creditors' rights after execution sale, to lend itself to any scheme designed to sacrifice the judgment debtor's property. The rule contended for would have that result: *Clayton v. Ellis*, 50 Iowa, 590; *Escher v. Simmons*, 54 Id. 269; *Harms v. Palmer*, 61 Id. 483; *Hardin v. White*, 63 Id. 633.

In our opinion, the defendant was not entitled to subject the land to his judgment.

Affirmed.

MERGER OF EQUITY OF REDEMPTION INTO LEGAL ESTATE: See *Knowles v. Lawton*, 63 Am. Dec. 290.

HELLMAN v. KIENE.

[73 IOWA, 448.]

STATUTE OF LIMITATIONS. — AFTER AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS, it is competent for the assignor to make a new promise in writing to pay, which will have the effect to revive the debt, thus removing the bar of the statute and binding the assignee, and the other creditors have no ground to complain.

Graham and Cady, for the appellant.

Fouke and Lyon, for the appellee.

BECK, J. 1. William Stolteben assigned his property to defendant for the benefit of his creditors. The plaintiff filed a claim with the assignee, based upon six promissory notes made to him by the assignor. As to five, there is no dispute; but the assignee and the creditors, other than plaintiff, object to the payment of the other one, on the ground that it was barred by the statute of limitations before the assignment. After the claim of plaintiff was filed with the assignee, the assignor made a promise in writing to pay this note. The circuit court held that this new promise does not remove the bar of the statute of limitations, which is set up by the assignee and the other creditors. The question for our determination in the case is this: Is it competent for the assignor, after the assignment is made, to make a new promise in writing to pay, which will have the effect to revive the debt, thus removing the bar of the statute? The circuit court held that it would not. We think the decision should have been the other way.

2. The assignment transferred the legal title of the property

of the assignee, to be held in trust by the assignee for the payment of the creditors of the assignor, and if any balance remained, to pay to the assignor, who continued to hold a trust interest to that extent in the property. The assignment did not change the relation of the creditors and the assignor. He continued to be the debtor, and his contracts upon which his indebtedness arose continued binding upon him. The only effect of the assignment, as between the debtor and creditors, was to subject the property assigned to the payment of his debts. The assignee, under the law, is charged with the power and duty to devote the property to that purpose. He cannot by his acts or objections change the rights and relations existing under the contract between the assignor and his creditors.

The statute provides that an action on a promissory note is barred in ten years, and that a cause of action thus barred is "revived . . . by a new promise to pay the same," made in writing: Code, sec. 2539. This new promise is of course to be made by the debtor. The statute does not contemplate the promise of any other person. Therefore it cannot be made by the assignee, and the statute of limitations, conferring upon the debtor a personal right to protection, cannot, therefore, be invoked by any other person: See *Sanger v. Nightingale*, 122 U. S. 176. An executor or an administrator may plead the bar of the statute (*Sanders v. Robertson*, 23 Miss. 389), on the ground, probably, that he stands in the place of the deceased, and may enforce all of the personal rights he held while living. But an executor or administrator cannot revive the debt, after it is barred, by a new promise to pay, for the reason, probably, that he was not the party making the original promise, and is not authorized to renew the promise of the decedent, and bind the estate thereby: See *Bloodgood v. Bruen*, 8 N. Y. 362; *Henderson v. Ilsley*, 11 Smedes & M. 9; 49 Am. Dec. 41. The right to invoke or waive the protection of the statute, being personal in its nature, can be exercised by the debtor, and by him alone. He may be required, in good conscience, to waive it and revive the debt. The law will in no manner impose a burden upon him by forbidding him to do that which his conscience directs him to do. If he revive the debt by a new promise, the other creditors have no ground to complain. They are deprived of no right which is paramount to the right of the creditor whose debt is revived. They possess no lien or priority which is defeated. They do not stand in the posi-

tion of purchasers, and hold no equity superior to the other creditors.

3. *Day v. Baldwin*, 34 Iowa, 380, is not in conflict with our conclusions. The person making the admission which in that case was set up as reviving the debt had no interest in the event of the suit, and it was not sought to bind him by the judgment. In this case, the assignor is the debtor, notwithstanding the assignment, and he has an interest in the distribution of the proceeds of the property assigned, and is entitled to the surplus, should any remain after the debts are paid.

It is our opinion that the judgment of the circuit court ought to be reversed.

DEBTOR MAY WAIVE BAR OF STATUTE OF LIMITATIONS AND REVIVE DEBT by new promise made after commencement of proceedings in insolvency, and either before or after discharge: See *Lerow v. Wilmarth*, 83 Am. Dec. 701; *McWillie v. Kirkpatrick*, 64 Id. 125.

LUCE v. MOOREHEAD.

[73 IOWA, 498.]

CHATTEL MORTGAGE COVERING "ALL CROPS GROWING AND TO BE GROWN" is not void for uncertainty as to that part which refers to "all crops growing," in that it fails to specify the year in which the crop was to be grown, but is void as to the part which refers to the crops "to be grown."

EVIDENCE. — IN ACTION TO ENFORCE LANDLORD'S LIEN against crops alleged to have been converted, certain chattel mortgages upon the crops, held by third persons, which were executed after the crops were planted, and before the conveyance of the land to the plaintiff, are admissible in evidence, when they would, if they were paramount to the lien, defeat a recovery.

H. H. Roadifer and J. W. Barnhart, for the appellant.

S. H. Cochran, for the appellees.

BECK, J. 1. The petition alleges that plaintiff held a landlord's lien upon certain grown corn upon land leased by her to one Lake, for which the rent remains due and unpaid, and that Lake sold and delivered the corn to defendant Moorehead, which he has converted to his own use. The plaintiff seeks in this action to recover the value of the corn. The defendant alleges in his answer that Lake executed to him a chattel mortgage, under which he acquired the corn in controversy, before the lease upon which plaintiff claims was executed; that Lake at that time owned the land upon which the corn

was grown, and subsequently conveyed it to plaintiff, and executed the lease, and that the corn was planted before the lease was executed. Hillis intervened, claiming that the corn was covered by a chattel mortgage executed to him by Lake before the mortgage to defendant Moorehead was executed. The cause was tried to a jury, and a verdict was had for defendant as against plaintiff, and for the intervenor as against defendant for a small sum, upon which judgments were rendered. Plaintiff appeals, but defendant does not appeal from the judgment in favor of the intervenor.

2. The mortgage under which defendant acquired the corn conveys, among other property, "all crops growing and to be grown" upon the land covered by plaintiff's lease. The evidence supports the allegations of defendant's answers as to the date of the execution of the mortgage being prior to the execution of the deed of the land and the lease to plaintiff, and the allegation that the corn was planted before the mortgage was executed. But plaintiff insists that the mortgage as to the corn is void for uncertainty in the description, for the reason that it fails to designate the year in which the crop was grown. Plaintiff, to support this position, relies upon *Pennington v. Jones*, 57 Iowa, 37. That case holds that a mortgage, covering crops "to be sown and raised" upon certain land described, was void for uncertainty, in that it failed to specify the year in which the crop was to be grown. As to the corn in question, there is no such uncertainty in the mortgage invoked in this case. It covers crops growing; that is, crops growing when the instrument was executed. It thus designates the year in which the crops are grown as the year in which the mortgage was executed. It would be void under the case just named as to the crops "to be grown"; but as such crops are not involved in this case, this uncertain description can have no effect upon defendant's rights. An instrument may be valid as to the property sufficiently described, and void for uncertainty of the description of other property. The objection to defendant's mortgage on the ground of uncertainty of the description was made upon the offer to introduce it in evidence, and was renewed in requests to instruct the jury. In each case it was correctly overruled.

3. The district court, against plaintiff's objection, permitted the mortgage under which the intervenor claims, and other mortgages to other persons, to be introduced in evidence. The objection is renewed in this court. We think it is not well

taken. Plaintiff seeks to recover for the conversion of property upon which she held a lien. If these mortgages were paramount to her lien, her claim would be defeated, for she could not recover against defendant unless she showed that she was entitled to enforce her lien against the corn. In that case, the holders of these mortgages, and not plaintiff, are entitled to complain on account of the conversion of the property. She cannot recover against defendant when it is shown, as it was by these mortgages, that her lien cannot be enforced against the corn.

As the defendant does not appeal, no question arises in the case as to the judgment in favor of the intervenor.

The foregoing considerations dispose of all questions argued by plaintiff's counsel. The judgment of the district court is affirmed.

MORTGAGE OF GROWING CROPS: See note to *Gregg v. Sanford*, 76 Am. Dec. 723 et seq.

DOWAGIAC MANUFACTURING COMPANY v. GIBSON.

[73 IOWA, 525.]

ALTHOUGH CONTRACT OF SALE IS IN WRITING, PAROL EVIDENCE OF FRAUD AND MISREPRESENTATIONS IS ADMISSIBLE TO DEFEAT RECOVERY when pleaded as a counterclaim to action on note given for the purchase price. The fact that the fraud and misrepresentations were made before the contract and note were executed does not prevent showing that they were inducements to the purchase, and that the vendee thereby sustained loss and damage.

SALE. — QUESTION OF VENDEE'S WAIVER OF RIGHT TO DEFEND ON GROUND OF FRAUD IS PROPERLY SUBMITTED TO THE JURY, where vendee had knowledge of the fraud prior to execution of written contract of sale, and thereafter executes note for purchase price, if there is some evidence tending to rebut the presumption that the note was a settlement of the claim for damages arising from the fraud.

SALE. — VENDOR'S FRAUD IS GROUND OF RECOVERY IN COUNTERCLAIM to action for purchase price of goods sold, although there is an absence of proof of warranty.

APPEAL. — RULINGS AND JUDGMENT OF TRIAL COURT ARE PRESUMED CORRECT, in the absence of positive error appearing in the abstract.

APPEAL by plaintiff. The facts appear in the opinion.

R. H. Whipple, for the appellant.

Williams and Baker, for the appellee.

BECK, J. 1. The defendant, in his answer, admits the execution of the note, but, as a defense, sets up a failure of con-

sideration, alleging that the note was given to plaintiff for the purchase price of two harrows and one seeder, and that one of the harrows was never delivered to him. He further sets up a counterclaim in the following language: "That the defendant was induced to purchase said machinery through the false and fraudulent representations of the plaintiff's agent, made prior to the execution of the note, to the effect that said machinery was well adapted to the use for which it was intended; that the said articles are ready sale, and well worth the price agreed to be paid, etc.; that, in fact, all the said representations were false and fraudulent, and that said machinery was not adapted to the uses represented; that it was of no value, and unsalable; that the defendant is an agricultural implement dealer, but did not know whether the representations were true or false, but, relying upon said representations, he purchased the goods in question, and that, on account of the worthlessness of said goods, and the false representations of plaintiff, he has been damaged in the sum of \$150, for which he asks judgment." The plaintiff claimed to recover the amount of the face of the note, \$95.55, with interest. The verdict and judgment were for plaintiff in the sum of ten dollars

2. The defendant was permitted, against plaintiff's objection, to introduce evidence showing the representations as to the character, quality, and value of the implements for which the note was given, made by plaintiff or its agent before the written contract of sale was made, and before the note was executed. It is insisted that the evidence was erroneously admitted, for the reason that it tends to establish, by parol, a warranty, when the contract was in writing, and could not, in that way, be varied, changed, or extended. But the evidence does not tend to establish a warranty, and was, doubtless, not introduced and admitted for that purpose. It was, however, competent to show fraud and misrepresentations, which defendant had set up in his counterclaim as a ground of defense and recovery on his part. The fact that the fraud and misrepresentations were made before the contract and note were executed does not prevent defendant from showing that he was induced thereby to enter into the contract, and that he suffered loss and damages thereby. The fraud and misrepresentations were inducements to the purchase, and of necessity must have existed before the execution of the written contract.

3. Plaintiff insists that the court ought to have sustained

its motion for a verdict, for the reasons that the evidence shows that defendant, when he executed the note, had knowledge of the breach of warranty and fraud, and thereby waived his right to set them up as a defense.

4. We need not determine the question as to whether such knowledge waives defendant's right, for the reason that there was some evidence tending to show that, when he executed the note, he reserved his right to claim damages for the fraud and misrepresentation. To justify the court in directing a verdict for one party, there should be an absence of all proof the other way. There being some evidence, though slight, the district court rightly submitted the case to the jury. While most of the evidence on this point was rejected or stricken out, yet it does not appear that defendant, in the negotiations resulting in the execution of the note, did claim damages, and there is other evidence tending to show that this claim was not settled or withdrawn when the note was given. The note was, in fact, a settlement of plaintiff's claim under the prior contract; but there is no evidence that other matters were settled. We think that there was some evidence tending to rebut the presumption that the settlement included defendant's claim for damages.

5. Plaintiff maintains that the verdict is not supported by the evidence, in that there was no proof of a warranty or fraud. As we have seen, the defendant could recover on the counterclaim, in the absence of proof of a warranty, upon the fraud and false representations. We think that the verdict upon the counterclaim is not without the support of evidence.

6. The abstract does not contain the instructions given to the jury. We are to presume that they were correct, and must exercise every presumption in support of the rulings and judgment of the court, in the absence of positive error appearing in the abstract. We reach the conclusion that no error is shown.

We have considered all questions argued by counsel. The judgment of the district court is affirmed.

FRAUD MAY BE SET UP AS DEFENSE IN ACTION UPON CONTRACT OF SALE for purchase price of goods sold: *Cecil v. Spurger*, 82 Am. Dec. 140; and see note to *Barnard v. Duncan*, 90 Id. 425 et seq.; though the contract be in writing: *Mante v. Gross*, 94 Id. 62.

ERROR MUST AFFIRMATIVELY APPEAR OF RECORD, or the rulings of the court will be presumed to have been correct: See *Jeffries v. Rudloff*, ante, p. 654, and note.

HINSON v. BAILEY.

[73 IOWA, 544.]

DEED IS DELIVERED to grantee where grantor leaves it with third party with instructions not to record it till after grantor's death, but with the manifest intent that it should take effect immediately. The third party in that case is only made custodian for the purpose of keeping the deed from record.

ACTION for partition; averment by defendants of sole ownership of the land in them. Appeal by plaintiffs from decree dismissing complaint.

Newman and Blake, D. Y. Overton, and Poor and Baldwin, for the appellant.

J. C. Power, for the appellee.

ADAMS, C. J. The land was formerly owned by one Eva Hinson, now deceased. The plaintiff and the defendants are her children and only heirs. The plaintiff avers that his mother, Eva Hinson, died intestate and seised of the land. The defendants claim to be the owners of the same by deed from Eva Hinson. The plaintiff does not deny the execution of the deed, but avers that the grantor was not of sufficiently sound mind to execute a valid deed. He also avers that there was no delivery of the deed by the grantor.

As to the alleged lack of mental capacity of Mrs. Hinson to make the deed, we have to say that we have all read the evidence separately, and have all reached the conclusion that the plaintiff's position cannot be sustained.

The alleged want of delivery presents a question of more difficulty. The facts are, that Mrs. Hinson had previously made a will devising the land to her daughters. Afterwards she concluded to revoke her will, and make a deed of the land to her daughters. She and the defendant Sarah Bailey went to a justice of the peace, and she signed and acknowledged a deed before him. She then left the deed in the custody of the justice, with instructions to keep it until she had died, and then file the deed for record. The justice told her that she could have the deed whenever she should want it, but she replied, "I don't want it. You must keep it until I die." She told the defendant Sarah Bailey, who had accompanied her to the justice, that she had deeded the land to her, as Mrs. Bailey understood. The plaintiff claims that the design of Mrs. Hinson was that the deed should take effect only after her death, and that, such being the fact, it was testamentary in

its character, and invalid, because not executed with the formalities which would enable it to take effect as a will; citing *Leaver v. Gauss*, 62 Iowa, 314; *Baker v. Haskell*, 47 N. H. 479; 93 Am. Dec. 455. The defendants contend that the grantor intended that the deed should take effect immediately, but that it should not be recorded until after her death, and that the justice of the peace was made by her custodian of the deed to carry out her intentions in that respect. In support of this, our attention is called to the fact that the evidence shows indisputably that Mrs. Hinson did not contemplate the possibility of reclaiming the deed, and did express herself to Mrs. Bailey as having made a conveyance. In our opinion, this position must be sustained. It may be, as claimed by plaintiff, that she did not surrender possession to the grantees; but the circumstances are such that we cannot attach much importance to such fact. In view of what Mrs. Hinson appears to have said to the justice, and of what she said to Mrs. Bailey, we do not discover any motive which she could have had in making the justice the custodian, except to keep the deed from the record during her life. We reach the conclusion that she understood that it operated as a deed, and that the justice was the custodian for the grantees. We think the judgment must be affirmed.

DELIVERY OF DEED TO TAKE EFFECT AT GRANTOR'S DEATH: See note to *Wellborn v. Weaver*, 63 Am. Dec. 244, 245. An actual delivery is essential to validity of the deed; merely placing it in an envelope with directions for delivery indorsed thereon, and placing it in a table drawer, is not a delivery: *Stone v. French*, 1 Am. St. Rep. 237, and note; *Davis v. Cross*, 52 Am. Rep. 177.

YOUNG v. SHANER.

[73 IOWA, 555.]

REVIVAL OF MORTGAGE — MISTAKE. — New mortgage is renewal of old one to the extent of old mortgage debt, and takes precedence of a lien of judgment obtained after the old mortgage was given and before the new mortgage was executed, where it appears that the mortgagee under the second mortgage was also the mortgagee under the first mortgage; that both he and the mortgagor were ignorant of the existence of the judgment, and that he would not have advanced the money on the second mortgage and canceled the old one had he known of the judgment lien.

Weber and Whipple, for the appellants.

Nagle and Birdsall, for the appellee.

ROTHROCK, J. The facts of the case as shown by the averments of the petition are as follows: On the twenty-second day of January, 1884, John H. Shaner and Sarah B. Shaner were the owners in common of 160 acres of land. On that day they borrowed four hundred dollars of the plaintiff, for which they executed to him their promissory note and a mortgage upon said land to secure the payment of the loan. On the twenty-ninth day of September, 1886, Witwer Brothers recovered a judgment against John H. Shaner in the district court of Wright County. The land being situated in that county, said judgment became a lien on the interest of John H. Shaner therein, but inferior to the lien of plaintiff's mortgage. In February, 1887, John H. Shaner conveyed his interest in the land to Sarah B. Shaner. Afterwards, Sarah B. Shaner applied to the plaintiff for a further loan. She stated to the plaintiff that John H. Shaner had conveyed his interests in the land to her, and she proposed to take up the note for four hundred dollars, and give a new note for the amount thereof, and to borrow enough in addition to make the new note six hundred dollars, to extend the time of payment, and secure the new note by a mortgage on the land, which should be a first lien thereon. The plaintiff acceded to the proposition. A new note for six hundred dollars was made, and a new mortgage was made to secure the same and placed on record, and the old mortgage was canceled. Both of the parties to the mortgage believed at the time it was made that there was no other lien on the land; neither had any knowledge of the existence of the judgment against John H. Shaner. It is averred that, if the plaintiff had known of the judgment against John H. Shaner, he would not have canceled the old mortgage, and that both of said parties were mistaken as to the facts. The prayer of the petition is, that the first mortgage be reinstated, and the amount thereof be deemed to be a lien prior and superior to said judgment. The demurrer was upon the ground that the facts stated in the petition do not entitle the plaintiff to the relief demanded.

It appears to us that *Bruse v. Nelson*, 35 Iowa, 157, is decisive of the case. The facts are so nearly alike that the same rule must be applied to one case as the other. Indeed, the case at bar is stronger in favor of the plaintiff than the cited case. It appears affirmatively that the plaintiff would not have surrendered the old mortgage and taken a new one if he had known there was a judgment lien on the land. The cases

of *Mather v. Jenswold*, 72 Iowa, 550, *Wormer v. Waterloo Agricultural Works*, 62 Id. 699, *Weidner v. Thompson*, 69 Id. 36, and *Goodyear v. Goodyear*, 72 Id. 329, are unlike the case at bar. In all those cases, the parties seeking to revive the satisfied mortgages were neither the mortgagees nor their assignees. They were either purchasers of the mortgaged property, or persons who sought to be subrogated to the rights of the mortgagees by reason of having paid the mortgage. In the case at bar, the new mortgage to the amount of the old may be regarded as a mere renewal, and the amount thereof a superior lien to the lien of the judgment. If the old mortgage had been paid off with money furnished by a stranger to it, as in *Mather v. Jenswold*, *supra*, and a new mortgage made for the money furnished, this would be payment in fact and in law. In the case at bar, the transaction was between the parties to the mortgage, and the old one was not paid.

We think the demurrer was properly overruled.

Affirmed.

REVIVAL OF MORTGAGES WHEN SATISFIED BY MISTAKE—ENFORCEMENT OF NEW MORTGAGE AS THE CONTINUATION OF THE LIEN OF A PRIOR ONE. — While the first question is an independent one in itself, yet a consideration of the second involves a discussion of the same principle which governs the determination of the first, and that is, that equity will relieve against mistake, accident, and fraud. The questions will, however, be considered in the order above indicated; but as preliminary thereto, it will be important to ascertain in brief what constitutes a discharge of record of a mortgage.

DISCHARGE OF MORTGAGE. — In general, a mortgage is discharged so soon as the condition therein is satisfied by the payment of the mortgage debt: *York County Savings Bank v. Roberts*, 70 Me. 384; and nothing more is necessary to revest the estate in the mortgagor: *Furbush v. Goodwin*, 25 N. H. 425; *Merrill v. Chase*, 3 Allen, 339; and it is also held that it is not necessary that such discharge be entered of record: *Perkins v. Sterne*, 23 Tex. 561; *Duty v. Graham*, 12 Id. 427; *McNair v. Picotte*, 33 Mo. 57; *Holman v. Bailey*, 3 Neb. 55. But although the cancellation of a mortgage and discharge of record is an absolute bar and discharge of the mortgage, yet courts of equity have inserted a saving clause in cases where there is fraud, accident, or mistake: *Garwood v. Eldridge*, 2 N. J. Eq. 145; 34 Am. Dec. 195; and cases herein, *post*.

WHEN MORTGAGE SATISFIED BY MISTAKE WILL BE REVIVED. — Mistake is equally a ground of relief in cases where mortgages have been inadvertently discharged and canceled as in other matters: *Cobb v. Dyer*, 69 Me. 494, 497. This doctrine is stated as follows in *Dudley v. Bergen*, 23 N. J. Eq. 397, 400: "Where the cancellation of a mortgage is procured by fraud, or made by mistake, or without authority and without actual payment and satisfaction, the canceling will be set aside and the mortgage enforced"; citing *Miller v. Wack*, 1 N. J. Eq. 214; *Lilly v. Quick*, 2 Id. 97; *Banta v. Vreeland*, 15 Id. 103. So where the words of a discharge of a mortgage were written upon the

margin of the record-book in the registry of deeds by accident and mistake, the court granted relief against such mistake: *Bruce v. Bonney*, 12 Gray, 107, 113. So chancery considers a lien still in existence, and will set aside a discharge of a mortgage, or adjust the equities between the parties, in a case where the mortgagee of certain lands, in consideration of a deed of part of them stated to be unencumbered, cancels a mortgage, and it subsequently transpires that attachments of which he had no notice had been levied on the land subsequent to the giving of the original mortgage: *French v. De Bow*, 38 Mich. 708. So where the mortgagor, by fraudulently concealing the fact that certain land was subject to a judgment lien, induced the mortgagee to cancel a mortgage, it was decreed that the lien of the mortgage should be reinstated: *Young v. Hill*, 31 N. J. Eq. 429; but the court, however, mentions the fact that in this case no rights of third parties intervened to prevent granting the relief asked, and where a junior mortgagee has paid off a senior encumbrance, and discharged the same of record, equity will reinstate the lien of the prior mortgage as against one who took a deed of the premises "subject to" the first mortgage, where such cancellation and discharge was made without knowledge of the existence of the deed against which the lien was sought to be established: *Cobb v. Dyer*, 69 Me. 494, 497. The court said: "In *Robinson v. Sampson*, 23 Me. 388, this court as then constituted assented to the proposition and adopted the language of the learned chancellor in New Jersey in *Trenton Banking Company v. Woodruff*, 2 N. J. Eq. 117, 'that the cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and leaves it open to the party making such objection to prove that it was made by accident, mistake, or fraud. On such proof being made, the mortgage will be established, even against subsequent mortgages without notice,' who became such anterior to the cancellation." But a mortgage executed to secure payment of a note, after being canceled by authority of the holder thereof, will not be revived in favor of a subsequent holder of the note: *Doll v. Rizotti*, 20 La. Ann. 263; 96 Am. Dec. 399; and if land be conveyed in satisfaction of a mortgage, and the title subsequently prove defective, the defect may be the subject of a new demand, but it will not operate to revive the original contract without the consent of the mortgagor, nor with his consent to the prejudice of an intermediate mortgagee: *Lasselle v. Barnett*, 1 Blackf. 150; 12 Am. Dec. 217, and note 222. Again, where the debt is paid and the mortgage discharged, no agreement thereafter, entered into between the parties that the amount so paid shall be applied in liquidation of another demand against the mortgagor, will revive the mortgage and give it new life as against third parties who have acquired rights subsequent to such payment, and especially so where such payments were indorsed on the mortgage note: *York County Savings Bank v. Roberts*, 70 Me. 384. So "a reissue of the note for a valuable consideration cannot afterwards carry a title to the land without a new conveyance in mortgage by deed, and the fact that the parties, acting under a mutual mistake as to the validity of such a contract, have undertaken to stipulate that the mortgage shall continue in force, cannot change the legal title." This case, however, rested on a parol agreement: *Merrill v. Chase*, 70 Me. 340; but see *Purser v. Anderson*, 4 Edw. Ch. 17, opinion of Vice-Chancellor McCoun. But although "equity will sometimes keep alive a mortgage which has been substantially satisfied," yet "it is always for the advancement of justice, and never to aid in the perpetration of a fraud through the forms of law": *McGiven v. Wheelock*, 7 Barb. 22, 29.

ENFORCEMENT OF NEW MORTGAGE AS CONTINUATION OF LIEN OF PRIOR ONE. — The acceptance by the first mortgagee of a new mortgage, and his cancellation of the old one, does not deprive him of his right to have the lien of the discharged mortgage continued against an intervening lien, where the act of cancellation was done in ignorance of the fact that the intervening lien existed: *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205, 207; unless there is some special disqualifying fact; and this, although such intervening lien was on record at the time: *Geib v. Reynolds*, 35 Minn. 331, 336, citing *Pomeroy's Eq. Jur.*, sec. 849. Such lien of the first mortgagee will be reinstated as against a judgment of which the releasor had no knowledge: *Barnes v. Mott*, 64 N. Y. 397. So it is held in *Hanlon v. Doherty*, 109 Ind. 37, 40, that “‘when a new mortgage is substituted in ignorance of an intervening lien, the mortgage released through mistake may be restored in equity, and given its original priority as a lien, where the rights of innocent third parties will not be affected’: *Sidener v. Pavey*, 77 Id. 241, 246. Mr. Pomeroy, in speaking of a lien, that it will be kept alive, says: ‘If there is no reason for keeping it alive, then equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another encumbrance, equity will not destroy it’: *Pomeroy's Eq. Jur.*, sec. 791. This general principle has very often been recognized and enforced by this court”; citing *Elston v. Castor*, 101 Ind. 426, 443; 51 Am. Rep. 754; *Edgerton v. Young*, 43 Ill. 464; *Clift v. White*, 12 N. Y. 519; *Forbes v. Moffatt*, 18 Ves. 384, and others; also 1 Jones on Mortgages, sec. 873. But where a mortgage is discharged by the payment of the debt secured thereby, it cannot be revived by a reloan to the mortgagor, to the injury of one whose encumbrance is *bona fide*, and intervenes: *Marvin v. Vedder*, 5 Cow. 671. And in case a party takes a new mortgage, and cancels the old one, merely to correct a mistake in the latter, and in the mean time another intermediate mortgage had been given, of which he had no knowledge, but thereafter, having full knowledge of such fact, he sells the property under the second mortgage, buys in the title, brings his action, and recovers the unpaid balance on the note, after deducting the amount for which he purchased the land, he may not then obtain relief on the ground of mistake against the lien of the intervening mortgage, since the position is one of his own choosing: *Childs v. Stoddard*, 130 Mass. 110. So it is held in *Waldo v. Richmond*, 40 Mich. 380, that where a mortgage is substituted for a prior one, the lien of the first mortgage will not be postponed to one fraudulently, and by connivance with the mortgagor, given and placed on record between the time when the first mortgage was discharged and the latter substituted. Some of the cases indicate that the courts of the states where they are decided are not inclined to grant relief in ordinary cases; and it is accordingly held in *Woolen's Ex'rs v. Hillen's Ex'r*, 9 Gill, 185, 52 Am. Dec. 690, note 693, that where one mortgage is released, and at the same time another one on the same property is given to the same mortgagee, this does not avoid the loss of the first mortgage lien. So “‘where a mortgagor borrows money to pay off a mortgage, and gives a second mortgage therefor, and the first is canceled, the second mortgagee has no equity to revive and be subrogated to the former mortgage in order to overreach an intervening lien”: *Anglade v. St. Avit*, 67 Mo. 434, 437. And following this doctrine, it is said in *Banta v. Garro*, 1 Sand. Ch. 383, 386, that “‘no case can be found where a third person, after voluntarily and intentionally discharging a lien in which he had no prior interest, and on faith of another security, has been permitted, as against other encumbrancers,

to revive such lien on ascertaining that his own security was worthless." It was declared in *Peckham v. Haddock*, 36 Ill. 38, 45, that a mortgage must be executed with all the formalities requisite to give it validity in the first instance in order to have it operate as a revival of a prior mortgage which has been discharged. So it was said by the court in *Spencer v. Fredenall*, 15 Wis. 666, 668, that "where a mortgage is once paid, it cannot, by a mere verbal agreement of the parties, be transferred to a new debt which it was not originally given to secure"; that is, the new mortgage in such case will not be deemed a mere continuation of the lien of a prior mortgage.

MISTAKE MUST BE ONE OF FACT. — The mistake which would justify a court of equity in reinstating a subsequent mortgagee to his rights under a prior mortgage must have been one of fact, and not of law: *Hampton v. Nicholson*, 23 N. J. Eq. 423; *Cobb v. Dyer*, 69 Me. 494, 497; unless the latter be accompanied by fraud or imposition of the other party, and "although a mistake as to the law of a foreign state is considered a mistake of fact in most cases, yet when a non-resident enters into a contract to be performed in another state, or relating to lands in a foreign state, he is held to know the law of such state, and in that case the mistake is one of law": *Bentley v. Whittemore*, 18 N. J. Eq. 366, 375.

INTENT OF THE PARTIES GOVERNS. — The intent governs, and where the intent is not to release, the prior mortgage will be kept alive: *Hanlon v. Doherty*, 109 Ind. 37. This principle, so far as applicable to cases where a mortgage merely discharged of record is sought to be revived, has been well stated, as follows: "A court of equity will keep an encumbrance alive, or consider it extinguished, as will best serve the purposes of justice, and the actual and just intention of the party. It must, at all events, be an innocent purpose, and injurious to no one": *Starr v. Ellis*, 6 Johns. Ch. 393, 395; *Goulding v. Bunster*, 9 Wis. 513, 515. To the same effect are the words of the court in *Champney v. Coope*, 32 N. Y. 543, 551, where it is said that "the doctrine is well settled by authority in relation to mortgages, that if the amount due thereon is paid, the intent of the parties in making such payment, whether to extinguish or keep alive the security, will govern": See also *Hunt v. Hunt*, 14 Pick. 374, 384; *Hubbell v. Blakeslee*, 71 N. Y. 63, 70; *Fleming v. Parry*, 24 Pa. St. 47; *Shaver v. Williams*, 87 Ill. 469, 471; and in cases where it is sought to have a new mortgage enforced as the continuation of the lien of a prior one, the principle that intent governs has been thus formulated: "As a general rule, a mere change in the form of the evidence of indebtedness will not operate to discharge a lien given to secure a debt, unless it is apparent that the parties intended to extinguish the lien. Whenever it is clear that the creditor still intended to retain it, his right is not affected by a mere change of the instrument which is the evidence of the debt, as the debt itself is the thing for which the lien was given, and a court of equity will keep an encumbrance alive, or consider it extinguished, as will best serve the purposes of justice, and the actual and just intention of the parties": *Howell v. Bush*, 54 Miss. 437, 444; *Cansler v. Sallis*, 54 Id. 446, 449, citing *Dillon v. Byrne*, 5 Cal. 455; *Swift v. Kraemer*, 13 Id. 526; *Flower v. Elwood*, 66 Ill. 438; *Nichols v. Overcracker*, 16 Kan. 54; see also *Jones v. Parker*, 51 Wis. 218. Therefore, if a mortgage be annually renewed for the mere purpose of changing the form of the security, and with the intent that the lien thereon of the first mortgage shall continue, then such lien will be treated as continuous under whatever form it exists: *Britton v. Criswell*, 63 Miss. 394, 402. And where the intended assignee of a mortgage and

its holder, in pursuance of an agreement for its assignment, and believing that such agreement would be effectuated, and their intentions better carried out thereby, discharged the mortgage of record, instead of keeping it on foot, as they intended, it was decided that equity would relieve against the mistake; and the court declared that there was "no appreciable distinction between this case and that where a scrivener, through ignorance or inattention, fails to select or prepare such an instrument as effectuates the previous agreement of parties": *Russell v. Mixer*, 42 Cal. 475, 477. So it is declared in *Stimpson v. Pease*, 53 Iowa, 572, 574, to be well-settled law "that a mortgagee may take a conveyance of the mortgaged property from his mortgagor, and still enforce the mortgage as against subsequent lien-holders, where there is no intention to discharge the mortgage as against them." In this case, the mortgaged property was, by order of the court, conveyed by the assignee to the mortgagee, and the mortgage was discharged of record; and it was held that the lien of the mortgage was valid as against liens subsequent to the mortgage. The cases relied on by the court were: *Stantons v. Thompson*, 49 N. H. 272; *Wickersham v. Reeves*, 1 Iowa, 413; *Gibson v. Crehore*, 3 Pick. 475; *Wilhelmi v. Leonard*, 13 Iowa, 330; *Lyon v. McIlvaine*, 24 Id. 9. And it was decided in *Shaver v. Williams*, 87 Ill. 469, 471, that where there is no intention of the parties to change their relative rights, and a new mortgage is given simultaneously with the release of the old, and the debt secured is identically the same as that secured by the prior mortgage, and the release of the old and filing for record of the new one are done at the same time, these facts are all strong indications that the intention of the parties was, that the lien of the first mortgage should stand as against a third mortgage which intervenes: See also *Burns v. Thayer*, 101 Mass. 426.

But in *Bowman v. Manter*, 33 N. H. 530, 66 Am. Dec. 743, the mortgagor paid and took up the mortgage note, and on the following day redelivered it to the mortgagee, receiving back a part of the money so paid, and the balance was indorsed on the note, upon an agreement that the mortgage should stand as security for the money due on account of the last loan. It was decided that the payment of the indebtedness due on the note operated as a discharge and release of the mortgage, and that the new agreement and redelivery of the note could not have the effect to revive the mortgage so as to shut out a judgment creditor whose rights had intervened without notice. The court intimated, however, that the decision might have been otherwise had there been any agreement, understanding, or intention which could "be inferred to uphold the mortgage after the note was paid."

CLEAR EVIDENCE OF MISTAKE REQUIRED. — A mere entry of satisfaction on the record is declared, in *Fleming v. Parry*, 24 Pa. St. 47, not to be conclusive that the bond is discharged; and to the same effect are the words of the court in *Heyder v. Excelsior etc. Ass'n*, 42 N. J. Eq. 403, 407, where it is stated that the "cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and it is left to the owner making the allegation to prove the canceling to have been done by fraud, accident, or mistake. Such proof being made, the mortgage will be established, even against subsequent purchasers or mortgagees without notice." But in this case the act of cancellation was that of a third party, and the first case was limited to cases where the rights of innocent third parties do not intervene. The general rule, however, is, where the mortgagee believes in and assents to the fact that the mortgage has been paid and canceled, that it requires very clear evidence to overcome the circumstance, and satisfactorily account therefor: *Banta v. Vreeland*, 15 Id. 103, 106. And clear evidence of fraud is required

to give a new mortgage precedence over prior liens where the mortgagee cancels and discharges a former mortgage given him by two parties, and the second mortgage is made by only one of them, and for a less sum than the first, and the note bears a different rate of interest: *Dingham v. Randall*, 13 Cal. 513. But it is not always necessary that the party asking relief should have exercised reasonable diligence to have obtained knowledge of the fact set up as the ground of relief: *Banta v. Vreeland*, 15 N. J. Eq. 103, 107. *Bruse v. Nelson*, 35 Iowa, 158, cited in the principal case, directly supports that case, but it also presents a peculiar question. It did not appear in evidence as a fact nor did the mortgagee testify that he would not have released the prior mortgage and made the arrangement which he did if he had known of the existence of the intermediate mortgage; that fact was merely inferred from the facts proved, it being declared that "a court is always at liberty, and indeed is required, to draw all the inferences which logically and naturally follow from facts proved. Reasonable diligence, caution, and prudence in the management of one's own business is a law of human conduct. This law is presumed to govern the conduct of a particular individual until he is shown to be an exception to the rule": *Id.* 160. This rule, as is well said by Beck, C. J., in his dissenting opinion, certainly encroaches upon the rule which is well established, that a mistake, to constitute a ground for relief, cannot be made out by any such inference, but must be clearly shown by satisfactory proof. This criticism, however, only affects the method of establishing the facts necessary to obtain relief, and does not go to the life of the principle that such facts being properly shown the relief will be granted. The case of *Geib v. Reynolds*, 35 Minn. 331, 337, supports the case of *Bruse v. Nelson*, *supra*, upon the point that the mistake may be inferred from circumstances as well as expressly established; citing 1 Story's Eq. Jur., sec. 162; *Barnes v. Mott*, 64 N. Y. 397; *Hyde v. Tanner*, 1 Barb. 75; *Cobb v. Dyer*, 69 Me. 494; *Stimpson v. Pease*, 53 Iowa, 572; *Wyche v. Greene*, 11 Ga. 159, 172; *Bruce v. Bonney*, 12 Gray, 107; 71 Am. Dec. 739.

RABEN v. CENTRAL IOWA RAILWAY COMPANY.

[73 Iowa, 579.]

CARRIERS OF PASSENGERS. — CONDUCTOR'S DUTY DOES NOT REQUIRE HIM TO ASSIST FEMALE PASSENGER to alight from the car with her two small children when she reaches her destination. The conductor is required, after having at a proper time announced the station, to stop the train, and hold it such reasonable time as will permit passengers to alight in safety. The law does not require him to know that all passengers intending to stop at the station have alighted in safety.

A. C. Daly and George D. Woodin, for the appellant.

Sampson and Brown, for the appellee.

BECK, J. 1. This action is brought to recover by the husband for injuries sustained by his wife, who had brought a suit in her own name to recover for the same injuries. A judgment in favor of the wife in her action was reversed

by this court. The petition of plaintiff in this case alleges that his wife was a passenger upon a car on defendant's railroad, having her own two small children with her. When she reached her place of destination, she proceeded to leave the car with her children, who were taken from the car, when the train began to move, through the negligence of defendant's employees, without allowing her sufficient time to get off; and in attempting to do so, she was thrown down and injured. Plaintiff alleges (referring to his wife getting off the car): "The conductor did not help her, nor offer to do so, nor advise her that it was not safe to get off; wherefore he says that the said injury was caused by the negligence and want of care of the conductor," etc. The evidence tended to support the allegations of the plaintiff's petition.

2. The district court, in presenting the issues of the case to the jury, among other things, stated that the petition alleged that the conductor negligently failed to see whether plaintiff's wife had alighted from the car, and caused the train to start before she had time to do so safely, and that "defendant failed to assist her to alight," thereby causing the injuries. In the third instruction, the court directs the jury that, to entitle plaintiff to recover, he must show by affirmative evidence, among other things, "that such injuries were caused directly by the negligence of defendant's employees, as substantially alleged." In the fourth instruction, the court directed the jury that it was the conductor's duty "to place her [plaintiff's wife], or enable her to alight in safety, on the platform." In these instructions, the court plainly directs the jury that it was the conductor's duty to assist plaintiff's wife to alight from the car. This court has held the law to be different, and that no such duty rests upon the conductor: *Raben v. Cent. Iowa R'y Co.*, 73 Iowa, 579. The instructions just referred to are therefore erroneous.

3. The seventh instruction directs the jury that, if the conductor "negligently failed to look and know that she [plaintiff's wife] had left the train in safety," and negligently started the train before she had done so, without her fault or negligence, plaintiff is entitled to recover. The instruction announces the rule that it was the conductor's duty to ascertain—"to look and know"—whether the plaintiff's wife had safely alighted. It imposes the duty upon the conductor not to start the train until he has made sufficient inspection of the car and passengers to be certain—"to know"—whether

the passengers have left the car, and are safely on the platform. We think the law imposes no such duty. The conductor is required, after having, at a proper time, announced the station, to stop the train and hold it such reasonable time as will permit passengers to alight in safety. He is not required to do what, in many cases, would be impossible to ascertain,—“to know” that all passengers intending to stop at the station have alighted in safety: *Imhoff v. Chicago & M. R’y Co.*, 20 Wis. 344; *Illinois Central R’y Co. v. Slatton*, 54 Ill. 133; 5 Am. Rep. 109; *Clotworth v. Hannibal & St. Jo. R’y Co.*, 80 Mo. 220; Shearman and Redfield on Negligence, sec. 275; *Fairmount etc. R’y Co. v. Stutler*, 54 Pa. St. 375.

Other instructions than those just noticed we think unobjectionable. Other objections, or the rulings on which they are founded, may not be repeated in a new trial, and need not be considered.

For the errors pointed out, the judgment of the district court is reversed.

DUTY OF CONDUCTOR OF RAILWAY TRAIN CEASES when he has given his passengers safe passage to the point of destination, announced the train’s arrival, and given reasonable opportunity to alight: *Hurt v. St. Louis etc. R’y Co.*, 4 Am. St. Rep. 274, and note. It is not the duty of the conductor to assist passenger to alight: *Raben v. Central Iowa R’y Co.*, 73 Iowa, 579.

WARNER v. WILSON.

[78 IOWA, 719.]

CHATTEL MORTGAGE IS VOID FOR UNCERTAINTY when it is given for cattle and their increase, if it contains no statement as to their present or past ownership, nor of the place where they are or have been kept, although the animals are described separately, their color, age, and name being given.

IN CHATTEL MORTGAGE IT IS NOT A SUFFICIENT LOCATION OF THE PROPERTY to say that is in a county named.

IN CHATTEL MORTGAGE, NO PRESUMPTION THAT MORTGAGOR OWNS THE PROPERTY OR THAT IT EXISTS ARISES from the execution of the mortgage.

ACTION to foreclose chattel mortgage. To the intervenor’s petition alleging a mortgage in himself of the same property, made after the plaintiff’s mortgage was recorded, the plaintiff demurred. The demurrer was overruled, and the intervenor obtained judgment. Plaintiff appealed.

F. O. Hinkson, for the appellant.

C. S. Fogg, intervenor, for himself.

ROBINSON, J. The demurrer raises but one question which we need to consider: Did the recording of plaintiff's mortgage impart constructive notice of the property sought to be encumbered thereby? The property in controversy consists of cattle and their increase. In most cases the animals are described separately, the color, age, and name being given. The mortgage of plaintiff contains no statement as to the present or past ownership of the property, nor of the place where it is now or has been kept. The descriptions are of the same character as those held insufficient in *Rhutasel v. Stephens*, 68 Iowa, 627, and other cases decided by this court, excepting that in this case the names of the animals are given. It is urged by appellant that, as the mortgage recites that the mortgagor is a resident of the county of Adair, and provides that in case he attempts to remove the property from that county it shall be lawful for the holder of the mortgage to take possession and foreclose at once, it must be presumed that the property was in Adair County and owned by the mortgagor, and that the giving of the name of each animal, in connection with its color and age, is sufficient to enable intervenor to identify the property by inquiries which the recitals named suggest. But we have held that it is not a sufficient location of the property to say that it is in a county named: *Muir v. Blake*, 57 Iowa, 662; also that no presumption arises from the execution of the mortgage that the mortgagor owns the property therein described, nor that such property is in existence: *Everett v. Brown*, 64 Id. 420.

We do not think the giving of the name adds materially to the description of this kind of property.

Affirmed.

SUFFICIENCY OF DESCRIPTION OF PROPERTY IN CHATTEL MORTGAGE: See *Stewart v. Jaques*, 4 Am. St. Rep. 86, and note, citing other cases where descriptions were held too indefinite.

SWAYNE v. WALDO.

[73 IOWA, 749.]

ON APPEAL, FINDING OF FACTS WILL NOT BE DISTURBED if there is any evidence which, fairly considered, will support it; such finding, made by the court in action tried before it, has the force and effect of a verdict of the jury.

SALE — KNOWLEDGE THAT WARRANTY WAS FALSE NEED NOT BE SHOWN. — If an article is warranted to be of a certain character, and this is shown to be false, the party injured may recover damages for breach of warranty without showing that party making the warranty knew it to be false.

SALE — RESCISSION OF CONTRACT. — WHERE PARTIAL PERFORMANCE consists in the payment by defendant of an indebtedness on goods delivered to him as a consideration for the transfer to plaintiff of certain lands, the latter cannot rescind, if he does not offer to repay defendant the money so paid out by him, but must keep the land, and is entitled to recover the difference between the contract price and what it is worth.

ACTION for breach of warranty. Averment of sale of certain goods to defendant, and the assignment to plaintiff as a consideration therefor of contracts owned by the defendant for the conveyance of certain lands, valued at \$12.50 per acre. Judgment in the sum of \$2,660, with interest, was demanded. Upon trial to court plaintiff obtained judgment, and defendant appealed. The other facts sufficiently appear in the opinion.

Gray, Warren, and Buchanan, for the appellant.

Harrington and Brockett, and Homer S. Bradshaw, for the appellee.

SEEVERS, J. 1. This being an action at law, the finding of facts made by the court has the force and effect of a verdict of a jury. It is not our province to weigh the evidence and determine any question of fact, as if the action was in equity. If there is evidence which, fairly considered, warrants the finding of the court, we cannot disturb it. After carefully reading the evidence, we feel constrained to say that the court was fully justified in making the finding it did. It is not our custom to set out the evidence at length, or state the reasons upon which our conclusion is based; and we deem it unnecessary to do so in this case, except as will hereafter be done in the discussion of certain legal propositions made by counsel.

2. It is said there is no evidence tending to show that the defendant knew that the representations made were false, and that this is essential in this action. In support of this posi-

tion, *Holmes v. Clark*, 10 Iowa, 423, and other cases, are cited. In the cited cases there were false representations only. In the case at bar it is alleged in the petition, and the court found, that the defendant "represented and warranted the lands to be choice, well-lying land, and in every respect first-class farm-land, lying within about two miles of O'Connor, Nebraska," and that the same "were false, and made with the intention to deceive and swindle the plaintiff." There is evidence upon which this finding can be supported, and therefore we think this case distinguishable from the cited cases; for it is undoubtedly true that, if an article is warranted to be of a certain character, and this is shown to be false, the party injured may recover damages for a breach of warranty, without showing that the party making the warranty knew it to be false.

3. The court found that the "defendant paid as outstanding indebtedness against said stock, including a lien he held, the sum of \$2,755.50, so that the amount defendant received for the land was \$2,646"; and the court also found that the plaintiff duly tendered back to the defendant the contracts for said land duly and legally assigned to him, and declared that he elected to rescind the contract. The plaintiff did not ask in the petition a rescission of the contract, but the parties seem to have tried the case on the theory that he did, and the court seems to have so understood. It will be observed that the court found that the defendant had paid, in pursuance of the contract, certain indebtedness of the plaintiff, amounting to \$2,765.50, and therefore the contract was partially performed on his part. The plaintiff did not offer to pay such amount to the defendant. This being so, can he rescind? or what is the amount he is entitled to recover? We think the settled rule in such case is, that the contract cannot be rescinded, and that the plaintiff can only recover such damages as he has sustained; that is, he must keep the land, and is entitled to recover the difference between the contract price and what it is worth: *Moore v. Bare*, 11 Iowa, 198; *Gates v. Reynolds*, 13 Id. 1. The court found the goods were not actually worth the amount the defendant agreed to pay, and, as a conclusion of law, found the plaintiff was entitled to recover \$2,363.60; this being, as the court thought, the amount the plaintiff gave for the land. Now, it is stated in the petition, in substance, that the land is of the actual value of four dollars per acre; and as there is about three hundred acres, it is evident the judg-

ment is excessive, and for a greater amount than plaintiff is entitled to recover.

There are other errors assigned and urged by counsel, none of which are well taken. For the error above stated, the judgment is reversed.

FINDINGS WILL NOT BE DISTURBED ON APPEAL, IF THERE IS ANY EVIDENCE which will reasonably support them: See *Bockenstedt v. Perkins*, ante, p. 651, and note.

IN ACTION FOR BREACH OF WARRANTY, PURCHASER NEED NOT SHOW that seller knew of falsity of his warranty: *Page v. Parker*, 80 Am. Dec. 172.

VENDEE CANNOT RESCIND CONTRACT WITHOUT RETURNING OR TENDERING to the other party any benefits he may have received thereunder: See note to *Bryant v. Isburgh*, 74 Am. Dec. 657-662.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

KANSAS CITY, ST. JOSEPH, AND COUNCIL BLUFFS
R. R. Co. v. RODEBAUGH.

[38 KANSAS, 45.]

OBJECTION TO JURISDICTION, WHEN TOO LATE. — Where action against railroad company is brought under statute (section 50 of Kansas Code) which makes provision as to when jurisdiction shall attach in such cases, and is tried in a justice's court, the judgment therein appealed from, and the case again tried, it is too late, upon a motion for a new trial then made, to object for the first time to the jurisdiction.

CARRIER OF PASSENGERS—TICKET LIMITING LIABILITY FOR BAGGAGE. — Before one can be bound by the declarations in a ticket for transportation on a passenger train, limiting liability for baggage checked by reason of the purchase of such ticket, the restrictions or limitations sought to be made must be known to the purchaser, and the ticket must have been accepted with full knowledge of the restrictions contained therein.

Frank Royse, for the plaintiff in error.

Tomlinson and Eaton, for the defendant in error.

CLOGSTON, C. This action was brought to recover the value of a trunk and its contents, which plaintiff in error received as baggage to be transported over its road and connecting lines to Mitchell, Dakota Territory. The findings of fact by the court show the following: That on the twenty-eighth day of August, 1884, plaintiff, defendant in error, desiring to go from Atchison to Mitchell, Dakota Territory, applied to the defendant at Atchison for a ticket from Atchison to Mitchell, and was by the agent informed of the price of a ticket or fare between said points, which amount the plaintiff paid, and was

given a ticket. The ticket received by the plaintiff was what was called a "skeleton ticket," with coupons attached, giving the names of the different roads over which plaintiff would travel in going from Atchison to Mitchell. At the time of receiving said ticket the agent made no statement of the contents of the ticket to the plaintiff, and she made no examination of the ticket. The heading of the ticket contained these words:—

"Special limited ticket. Good for one continuous first-class passage, when [—] stamped by the company's agent, subject to the following contract: In selling this ticket for passage over other roads, this company acts only as agent, and assumes no responsibility beyond its own line. None of the companies represented in this ticket will assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding one hundred dollars."

Below this printed matter was left a blank space for the signature of the purchaser, and also for a witness. Plaintiff was not required to and did not sign said ticket, and it was not witnessed or signed by any one. No reduction of fare was made by reason of the stipulation contained in the ticket. This ticket was for a passage, first, over the defendant's road from Atchison to Council Bluffs; from Council Bluffs, over the Chicago and Northwestern railway and the Sioux City and Pacific railroad, to Sioux City; from Sioux City, over the Chicago, Milwaukee, and St. Paul railway, to Mitchell, Dakota. After receiving this ticket, the plaintiff presented it to the baggage agent at the union depot at Atchison, and with it her trunk containing the usual wearing apparel of the plaintiff, and requested that the same be checked, which was done, and she received a check for the transportation of said trunk from Atchison to Mitchell, over the lines named in said ticket. Plaintiff boarded the defendant's train at Atchison, and defendant took charge of and placed said baggage upon the train, and the same was transported to Council Bluffs. When it arrived there, the trunk was, by the defendant's agents in charge of the train, assisted by the employees of the union depot at Council Bluffs, unloaded from the baggage-car and placed upon a truck, for the purpose of being transported into the depot. The defendant had also received as baggage, somewhere between Atchison and Council Bluffs, a box containing three jugs of sulphuric acid. The top of this box was covered with a cloth only. In unloading the baggage this box

was placed on the top of the truck containing the trunk of the plaintiff, and in this condition the truck was rolled into the baggage-room of the union depot by the employees of said depot, and in removing the baggage from the truck they first attempted to remove the box containing the sulphuric acid, and the contents of one of the jugs was spilled and ran over the baggage and the trunk of the plaintiff; the acid escaping by reason of the cork having been eaten up or destroyed by the acid, and the trunk and its contents were saturated by the acid, and all of its contents destroyed or burned up, save and except two or three articles. Plaintiff, on arriving at her destination, presented her check, and was informed that her trunk had not arrived; whereupon she went to a hotel and remained nine days, at an expense of \$11.25, waiting for her trunk to arrive. Finding that it did not come, she returned to Council Bluffs, and there learned of the destruction of the baggage, and the articles saved therefrom were turned over to her. Afterward she returned to Atchison, and commenced this action for the value of the trunk and its contents.

The first objection to this judgment is, that the court had no jurisdiction of the defendant, contending that, as this action was brought under section 50 of the Code of Civil Procedure, it (the defendant) did not come within the provisions of said section, under the facts shown in this case. The evidence shows, and the court found, that the defendant ran its train over its main line in Missouri, and at Atchison crossed the bridge owned by the bridge company to the union depot, over the tracks owned by the Union Depot Company, which company was composed of seven railroad companies, among which was the defendant. Defendant backed its train over the bridge to the union depot, where it received baggage and passengers for transportation over its line. No evidence was shown that there was any lease by which the defendant ran its trains over the bridge and to the depot at Atchison. Under this evidence, the defendant insists that it cannot be sued in the county of Atchison, for the reason that it does not lease, own, or control any line of road in the city of Atchison. The record shows that this action was brought in a justice's court, and appealed by defendant to the district court, where the case was tried upon the bill of particulars as filed in the justice's court. Nowhere does the record disclose any objections to the jurisdiction of the court, either before the justice of the peace or the district court, and the first objection made to the

jurisdiction of the court was made in the motion for a new trial. This seems to us to be too late to raise that question. If the defendant desired to challenge the jurisdiction of the court, it ought to have done so at an earlier period in the history of this case: *Miller v. Bogart*, 19 Kan. 117; *North Missouri R. R. Co. v. Akers*, 4 Id. 453; *Shuster v. Finan*, 19 Id. 114.

The second reason assigned why this judgment should be reversed or modified is, that the ticket issued by the defendant, and under which this baggage was checked, was a contract limiting the liability of the defendant, in case of loss of baggage, to one hundred dollars. It is, perhaps, true that the defendant might, by a special contract, limit its liability, so as not to be responsible, in case of loss of baggage, beyond a given sum, provided the contract was a reasonable restriction. In this case there was no contract on the part of the plaintiff, and no knowledge was conveyed to her of any intention on the part of the defendant to limit its liability save and except what the ticket itself contained; and this was not read or its contents made known to the plaintiff. Can this be called an implied contract? We think that, before the plaintiff can be bound by the declarations in the ticket for transportation on a passenger train, the restrictions or limitations sought to be made must be known to her, and she must have accepted the ticket with a full knowledge of the restrictions contained therein. This ticket contained a blank for the signature of the purchaser, and that signature was to be witnessed by some one. This was not done in this case. The object of that blank space being left there was, doubtless, that the attention of a purchaser might be called to the conditions of the ticket, and when called to sign it, he would then know its contents. This would constitute a contract between them; but without it, there would be no contract, and no restriction or limitation of the liability of the company. The ticket is not a contract of itself; it is simply evidence of a contract: *Lawson on Carriers*, secs. 106, 107. Before the giving of this ticket, there was nothing said between the parties that one was to limit his liability, under certain conditions or circumstances, and consequently the ticket could not be evidence of a contract that did not exist. Again, where a person purchases a ticket, he does not expect that thereby he is making a contract limiting the liability of the railroad company, but simply that he is receiving a check showing that the fare has

been paid over the line to the place of destination, wherever that may be: *Baltimore etc. R. R. Co. v. Campbell*, 36 Ohio St. 657; 38 Am. Rep. 617; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Atchison etc. R. R. Co. v. Roach*, 35 Kan. 740; 57 Am. Rep. 199, and cases there cited.

But defendant insists that this baggage was not destroyed or injured while in its possession or under its control, but after it had been transferred to the employees of the union depot at Council Bluffs. True, the baggage was in the union depot when it was destroyed, but it was there in the same condition that it was left or placed in by the agents of the defendant. Its employees had placed it upon the truck, and after it was placed there, with other baggage, nothing was done to it by the employees of the Union Depot Company to cause its destruction, but it was destroyed by reason of improper baggage having been placed on top of the trunk, which, when placed in the depot, its contents were spilled over the baggage, thus destroying it. Then it was the act and negligence of the defendant that caused the injury: it had received a box not in condition to be taken as baggage, containing a jug of acid, which was liable to be broken and its contents spilled over the baggage, and had carelessly and negligently placed such box on the trunk of the plaintiff. Without passing upon the question as to the liability of the defendant had the baggage been transferred to a connecting line, and then by the negligence of the employees of said connecting line the baggage had been lost, we hold that the defendant, by its negligence and carelessness, caused the destruction of this baggage, and is liable therefor.

It is recommended that the judgment of the court below be affirmed.

By the COURT. It is so ordered.

PURCHASER OF RAILWAY PASSENGER TICKET DOES NOT BY ITS MERE ACCEPTANCE acquiesce in and bind himself to all terms and conditions printed thereon, in absence of actual knowledge of them: *Kent v. Baltimore etc. R. R. Co.*, 4 Am. St. Rep. 539, and note.

JURISDICTION OF NON-RESIDENTS GENERALLY: See note to *Molyneux v. Seymour*, 76 Am. Dec. 665-671.

CARRIERS' CONTRACT—EFFECT OF WORDS "NOTICES," "RAILWAY TICKETS," "BAGGAGE-CHECKS," ETC. —The question whether a common carrier may by words or notices, or by tickets or checks with printed conditions thereon, make a contract in his own favor, has been well considered, both in the notes and selected cases in the American Decisions and American Re-

ports; so that this note will be merely an addenda thereto, embodying some of the most recent decisions. With reference to baggage there is one determining principle, and that has been stated as follows: "It has been settled for a considerable time that the baggage of a passenger intrusted to one whose business it is to transport persons and their baggage, and with whom the owner has embarked, is under the same protection as the goods which are intrusted to a common carrier of goods": *Merrill v. Grinnell*, 30 N. Y. 594, 609. The rule is simplified in *Wilson v. Chesapeake etc. R. R. Co.*, 21 Gratt. 654, 664, to the statement that carriers of passengers are liable for their ordinary baggage as common carriers, and that no distinction exists whether the passenger is traveling with his baggage or it is carried without him.

COMMON-LAW LIABILITY OF CARRIERS OF GOODS MAY NOT BE LIMITED BY A GENERAL NOTICE. Notwithstanding some decisions to the contrary, it may be stated as a general rule, established by a great weight of American authority, that a common carrier cannot limit his common-law liability by any general notice: *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y. 485; 62 Am. Dec. 125, and note 129; *Kimball v. Rutland etc. R. R. Co.*, 26 Vt. 247; 62 Am. Dec. 567; *Steele v. Townsend*, 37 Ala. 247; 79 Am. Dec. 49; *Judson v. Western R. R. Co.*, 6 Allen, 486; 83 Am. Dec. 646; *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349, and note 362. While this rule has not perhaps been stated in this exact form in some of the cases, yet the same conclusion has been arrived at in those cases, and many decisions have even gone to a greater extent. In Georgia, it is declared that a carrier cannot limit his liability by any act of his own to which the shipper does not consent: *Wallace v. Matthews*, 39 Ga. 617; 99 Am. Dec. 473, and note 479. Therefore a clause inserted in a bill of lading by such carrier does not operate as a limitation of his liability where such restriction is not agreed to by the shipper: *Central R. R. Co. v. Dwight Mfg. Co.*, 75 Ga. 609; and it is held in several cases that a common carrier may not exempt himself from liability by notice, or by words on a railway ticket or baggage-check, whether brought home to the owner or not: *Cole v. Goodwin*, 19 Wend. 251; 32 Am. Dec. 470, and note 495; *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y. 485, 490; *Blossom v. Dodd*, 43 Id. 264; *Hollister v. Nowlen*, 19 Wend. 234; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; *Perkins v. New York Cent. R. R. Co.*, 24 N. Y. 196; *Baltimore etc. R. R. Co. v. Campbell*, 36 Ohio St. 647; 38 Am. Rep. 617; *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212; 8 Am. Rep. 543; *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349, and note 363; but see *Wilson v. Chesapeake etc. R. R. Co.*, 21 Gratt. 654, 672; *Logan v. Ponchartrain R. R. Co.*, 11 Rob. 24; 43 Am. Dec. 199. It is declared in Massachusetts that the assent to a restriction on the liability of a common carrier, created by notice, is not to be inferred from the mere fact that knowledge of such notice on the part of an owner or consignor is shown. The evidence must show that the terms were adopted as the contract between the parties: *Buckland v. Adams Express Co.*, 97 Mass. 124; 93 Am. Dec. 68, and note 73. So the taking of a receipt from a carrier of goods is only *prima facie* evidence of an acceptance of its terms restricting liability for goods to be carried; and it may be shown by parol that such receipt was never accepted by the shipper as a binding contract for the purpose of limiting such liability: *Strohn v. Detroit etc. R. R. Co.*, 21 Wis. 554; *Western Transit Co. v. Hosking*, 19 Ill. App. 607. Nor is the assent of a shipper to the limitations in a bill of lading necessarily to be presumed from acceptance of the bill: *Adams Express Company v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57; but see *Steele v. Townsend*, 37 Ala. 247; 79 Am. Dec. 49, and note 57; *McMillan v.*

S. N. & I. R. R. Co., 16 Mich. 79; 93 Am. Dec. 203. So a notice contained in a carrier's bill of freight tariff and receipt, "that all goods and merchandise will be at the risk of the owners while in the storehouses of the company," will not prevent the carrier's liability for loss of goods; and a notice on the back of a receipt forms no part of the contract, it need not be set out in the declaration, and omitting to do so is not a variance. A receipt is only *prima facie* evidence that consignor assented to conditions, and may be contradicted by parol evidence: *Western Transp. Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760, and note 775; *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349; *Strohn v. Detroit etc. R. R. Co.*, 21 Wis. 554; 94 Am. Dec. 564. Again, a notice that baggage would be at the risk of the owner, printed and placarded at the public offices of a stage company, will not limit its liability as a common carrier: *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455, and note 468. Nor is the fact that a notice, limiting a railroad company's liability for carrying baggage, is printed on the face of the ticket, of any effect: *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212; *Blossom v. Dodd*, 43 Id. 264. So notice upon a Pullman sleeping-car ticket, printed upon its face, that "wearing apparel or baggage placed in the car will be entirely at the risk of the owners," does not relieve the company from liability for the loss of baggage left with the porter of the sleeping-car, and such ticket can have no bearing upon a case where the suit is against the railroad company alone, further than the fact that the sleeping-car was part of defendant's train, and a contract with the sleeping-car company does not relieve the railroad company: *Louisville etc. R. R. Co. v. Katzenberger*, 16 Lea, 380; 57 Am. Rep. 232. Nor does the law raise any presumption that a passenger on a railroad has read a notice limiting the company's liability for baggage from the fact that such notice is printed on the back of a check delivered to the passenger, which check has on its face the words "Look on the back," nor from the fact that such notice is printed on a placard posted in the car, and containing other notices which the passenger has read: *Malone v. Boston etc. R. R. Co.*, 12 Gray, 388; 74 Am. Dec. 598. But the case of *Brown v. Eastern R. R. Co.*, 11 Cush. 97, 98, makes a distinction between limitations stated on the face of the ticket and those printed on its back, "and detached from what ordinarily contains all that is material to the passenger." There would not seem, however, to be very great force in this, in view of the law hereinafter stated, that actual notice is required to bind the passenger with knowledge of the terms intended to be imposed. It was further argued in *Brown v. Eastern R. R. Co.*, 11 Cush. 97, 98, that "a mere passenger ticket, in the form in general use, would not naturally induce to the minute reading of its contents." So it is held in Indiana that where a passenger upon a railroad train delivered his baggage to the company to be transported to his destination, and received a baggage-check in return, upon which was stamped a notice that in consideration of free carriage the company's liability in case of loss of the baggage was limited to one hundred dollars, such notice does not exempt the company from liability above that amount in case the baggage is lost: *Indianapolis etc. R. R. Co. v. Cox*, 29 Ind. 360; 95 Am. Dec. 640. To substantially the same effect is the case of *Nevins v. Bay State*, 4 Bosw. 225, where it was determined that where a railroad ticket limited the amount of baggage which a passenger would be permitted to carry to a sum not to exceed one hundred dollars in value, and providing that a certain additional sum should be paid for baggage carried which exceeded that valuation, such restriction would not prevent a passenger from recovering the value of a trunk which he had lost, and the value of so much of its contents as would come within what is

generally known as travelers' baggage, and which was reasonable in quantity and value, although nothing extra was paid for the excess over one hundred dollars in value. So a mere notice in a bill of lading is not sufficient: *Georgia R. R. Co. v. Gann*, 68 Ga. 350. Nor is any notice given by publication: *Southern Express Co. v. Purcell*, 37 Id. 103; 92 Am. Dec. 53. Nor a memorandum on a card or ticket delivered on receiving goods for transportation: *Prentice v. Decker*, 49 Barb. 21. Nor is a general notice evidence of a contract limiting the carrier's liability: *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349, and note 363. Nor does such general notice create a presumption of an implied contract not to hold the carrier liable for baggage: *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455. Nor may the carrier limit its liability by usage established by itself: *Evansville etc. R. R. Co. v. Young*, 28 Ind. 516. Nor is knowledge of the limitation conveyed by a notice posted up in the company's cars, disclaiming responsibility for personal property left in the berths of a sleeping-car; and where a passenger occupying a berth therein loses personal property by theft, through want of reasonable care by the company, recovery may be had from it for such loss: *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267; and stage-coach proprietors are included in the rule that common carriers may not limit their liability by a general notice that passengers' baggage is at their own risk: *Hollister v. Nowlen*, 19 Wend. 234; *Jones v. Voorhees*, 10 Ohio, 145; *Cole v. Goodwin*, 19 Wend. 251; *Powell v. Myers*, 26 Id. 591.

The general rule, then, is, in brief, that a common carrier cannot, by mere declarations, stipulations, or notices, upon a ticket or check, or otherwise by a mere general notice, limit his liability: *Georgia R. R. Co. v. Gann*, 68 Ga. 350; *Wilson v. Chesapeake etc. R. R. Co.*, 21 Gratt. 654, 672; Story on Contracts, sec. 761; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Evansville etc. R. R. Co. v. Young*, 28 Ind. 516; *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455, and note 468; *Logan v. Ponchartrain R. R. Co.*, 11 Rob. 24; 43 Am. Dec. 199; *Southern Express Co. v. Purcell*, 37 Ga. 103; 92 Am. Dec. 53, and note; *Southern Express Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783. Notwithstanding the reason and justice of the rule, and the array of sound authorities supporting it, the Pennsylvania cases, by an unbroken line of decisions, hold, as is declared in *Lainq v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533, and note 538, that a carrier may limit his liability by notice to passengers that the baggage is at their own risk. The court, however, in deciding this follows *Bingham v. Rogers*, 6 Watts & S. 495, and says, referring to cases *contra*: "Were the question an open one in Pennsylvania, I should for one unhesitatingly follow them in repudiating a principle which places the bailor absolutely at the mercy of the carrier, whom, in a vast majority of instances, he cannot but choose to employ"; and in *Pennsylvania R. R. Co. v. Schwartzberger*, 45 Pa. St. 208, the rule is given that a notice upon a through-ticket limiting liability for baggage beyond its own line is binding on the purchaser. The case of *Pennsylvania R. R. Co. v. Riordon*, 119 Id. 577, 4 Am. St. Rep. 670, follows the doctrine early established in that state, and it was said by the court in that case that it was "too late to deny that in Pennsylvania a common carrier may limit his liability by special contract. In *Atwood v. Reliance Transp. Co.*, 9 Watts, 87, 34 Am. Dec. 503, Gibson, C. J., recognized the rule as well established, although expressing grave doubts of its wisdom. In *Lainq v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533, this court again gave its assent to the rule; while Bell, J., by whom the opinion was delivered, expressed his sympathy with the doubt of Chief Justice Gibson. The same rule has been held in

many later cases; among which are *Powell v. Pennsylvania R. R. Co.*, 32 Pa. St. 414; 75 Am. Dec. 564; *Am. Ex. Co. v. Lands*, 55 Pa. St. 140; *Pennsylvania R. R. Co. v. Miller*, 87 Id. 395; *Adams Ex. Co. v. Sharpless*, 77 Id. 517; *Clyde v. Hubbard*, 88 Id. 358." Though there is a Pennsylvania case which limits the rule as follows: the carrier may by a general notice, clear and explicit in its terms, limit his liability, provided the other party has full information of the terms of limitation and the effect thereof (*Camden etc. R. R. Co. v. Baldauf*, 16 Pa. St. 67), yet printing such restrictions as to liability upon the ticket, check, or notice in smaller letters than those which state the general object of such ticket, etc., does not amount to actual notice: *Verner v. Sweitzer*, 32 Id. 208. In *Steers v. Liverpool, N. Y., & P. Steamship Co.*, 57 N. Y. 1, 5, 15 Am. Rep. 453, and note 457, the plaintiff purchased a passage to Europe, which was evidenced by a written engagement signed by her; this paper provided that a certain amount of luggage should be allowed each passenger free of charge, and that in consideration thereof the company were not to be held liable for loss or damage to the same unless it should be "proven to have occurred from gross negligence of said company or their servants"; and the recovery was limited in any event to the sum of fifty dollars, "unless a bill of lading or a receipt be signed therefor, specifying the articles and their respective values"; and the restrictions were printed in smaller type than the rest of the agreement, but were "all printed on one side of the paper, and all the printed matter preceded the signature of the agent of the defendant." The court said: "That the plaintiff herself never read the paper is of no moment. The arrangement was made by her agent, who must be presumed to have acquainted himself with the terms of the engagement which the defendant assented to. Looking to the course of business, the court may take notice that an engagement for a voyage across the ocean is a matter of more deliberation and attention than buying a railroad ticket or taking an express company's receipt for baggage or for freight. There is, therefore, no room in such a case for the suggestion that the party is surprised into a contract when he supposes himself only to be taking a token indicative of his right," and the paper was declared to be a contract between the parties limiting the company's liability, and this case goes also to the extent of deciding that in the absence of fraud, concealment, or improper practice, the legal presumption is, that stipulations limiting the common-law liability of common carriers contained in a passenger's ticket are known to the party receiving it.

THE KIND OF NOTICE does not change the rule above given, since there is no distinction between notice in newspapers or by handbills and notice printed on back of carrier's receipt or elsewhere; for wherever it may be found it is but notice: *Western Transp. Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760, and note 775.

PASSENGER TICKETS OR CHECKS ARE MERE VOUCHERS. — Passenger tickets must be held to be rather vouchers or evidences that fare has been paid by the holders than contracts regulating the conditions of passage. "The party receiving a ticket might well suppose it was a mere check signifying that the party had paid his passage to the place indicated on his ticket": *Brown v. Eastern R. R. Co.*, 11 Cush. 97, 98; *Nerins v. Bay State*, 4 Bosw. 225; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Baltimore and Ohio R. R. Co. v. Campbell*, 36 Ohio St. 647; 38 Am. Rep. 617, 618; and the same rule applies to baggage-checks: See cases *ante*.

EFFECT OF ACTUAL KNOWLEDGE OF TERMS OF NOTICE, ETC., BY PASSENGER OR SHIPPER. — Notwithstanding the rule above given, it is said in *Brown v.*

Eastern R. R. Co., 11 Cush. 97, 98, which was decided in 1853, that "the doctrine is nevertheless gradually being incorporated into the jurisprudence of the times that such limitations may, under proper qualifications and safeguards for securing due notice to the traveler, or the party for whom the goods are to be transported, be held operative and binding upon the parties"; citing *Bingham v. Rogers*, 6 Watts & S. 495; *Laing v. Colder*, 8 Pa. St. 484; *Swindler v. Hilliard*, 2 Rich. 286. So it has been held that there must be actual notice, or circumstances such as that the failure to read was caused by the actual negligence of the passenger, in order to make binding a limitation on a ticket restricting carrier's liability for loss of baggage: *Mauritz v. New York etc. R. R. Co.*, 23 Fed. Rep. 765; but general words are not sufficient in a shipping contract; the intent must be so clearly expressed as that it cannot be misunderstood: *Nicholas v. New York etc. R. R. Co.*, 89 N. Y. 370; and it is held in Massachusetts that common carriers may restrict their common-law liability as insurers by notice brought home to the owner of goods before or at the time of delivery to them, if such notice be assented to, either expressly or impliedly, by the owner, if assent is clear and unequivocal: *Judson v. Western R. R. Co.*, 6 Allen, 486; 83 Am. Dec. 646; *Barney v. Harris*, 4 Har. & J. 317; *Buckland v. Adams Ex. Co.*, 97 Mass. 124; 93 Am. Dec. 68, and note 73; *Fillebrown v. Grand Trunk R'y Co.*, 55 Me. 462; 92 Am. Dec. 606; *Cooper v. Berry*, 21 Ga. 526; 68 Am. Dec. 468. So in Kentucky, a public notice given by a common carrier, and brought home to the knowledge of the shipper, enters into the contract of affreightment so far as the carrier has the right to impose such terms, either by express or implied contract, not, however, inconsistent with the express contract, and such notice will be considered in construing the contract when its terms do not conflict with the express undertaking: *Orndorff v. Adams Ex. Co.*, 3 Bush, 194; 96 Am. Dec. 207, and note 211. So where the terms of the notice are clear and explicit, and the passenger is proven to have had actual knowledge thereof, it will be deemed binding on him, but where the passenger was unable to understand the English language, it was decided that a general notice could not affect him: *Camden and Amboy R. R. Co. v. Baldauf*, 16 Pa. St. 67. But such notice, in order to be availing, must also be actual, or such as may be implied from the circumstances, or it should be brought to the knowledge of the passenger at least "in time to leave the car, and have his baggage removed, before the train leaves": *Wilson v. Chesapeake etc. R. R. Co.*, 21 Gratt. 654, 676; Story on Contracts, sec. 761; see also *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212; *Blossom v. Dodd*, 43 Id. 264. And it is said in New York that if the passenger's attention is called to the notice limiting the weight and value of his baggage by the ticket agent at the time of its purchase, or it is otherwise shown that he was aware of the notice at that time, he will be presumed to have assented to its terms, in the absence of any objection thereto on his part: *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212; 8 Am. Rep. 543; *Blossom v. Dodd*, 43 N. Y. 264. The case of *Railroad Co. v. Fratoff*, 100 U. S. 24, is one in which the rule was laid down that there might be a limitation of liability in favor of the carrier, but the proviso made by the court, when stating the rule, was, that such restriction should be reasonable; that it should have been brought to the actual knowledge of the passenger, and should not be inconsistent with the duties of such carrier to the public, nor with any statute; and that the carrier might provide that where baggage exceeded a fixed amount in value there should be paid an additional compensation proportioned to the risk, and might rightfully require as a condition precedent to any contract for the transportation of baggage information from the passenger as to its value.

CARRIER'S LIABILITY MAY BE LIMITED BY EXPRESS CONTRACT. — Outside of implied contracts above noticed, arising from bringing actual knowledge of the restriction or condition sought to be imposed home to the passenger or shipper, there is no doubt but that the general liability of a common carrier may be restricted or diminished by express or special contract to which the passenger or shipper has assented: *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349, and note 363; *Parson v. Monteath*, 13 Barb. 553; *Well v. New York Cent. R. R. Co.*, 24 N. Y. 181; *Southern Express Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783; *Atwood v. Reliance etc. Co.*, 9 Watts, 87; *Bingham v. Rogers*, 6 Watts & S. 495; *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 338; *Express Co. v. Caldwell*, 21 Wall. 267; *Cooper v. Berry*, 21 Ga. 526; 68 Am. Dec. 468; *Thayer v. St. Louis R. R. Co.*, 22 Ind. 26; 85 Am. Dec. 409, and note 412; *Georgia R. R. Co. v. Gann*, 68 Ga. 350; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485, 492; *Farmers' etc. Bank v. Champlain Transportation Co.*, 23 Vt. 186; *Western Transportation Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760, and note 775; *Graham v. Davis*, 4 Ohio St. 362; 62 Am. Dec. 285, and note 294; *Roberts v. Riley*, 15 La. Ann. 103; 77 Am. Dec. 83; *Southern Express Co. v. Purcell*, 37 Ga. 103; 92 Am. Dec. 53, and note 56; *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117; *Mobile etc. R. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607; *Indianapolis etc. R. R. Co. v. Cox*, 29 Ind. 360; 95 Am. Dec. 640; *McFadden v. Missouri Pacific R. R. Co.*, 92 Mo. 343; 1 Am. St. Rep. 721. Although this rule is less broadly stated in *Smith v. New York etc. R. R.*, 29 Barb. 132, where it is said that there may be a restriction to a limited degree. The contract must also be clear and specific: *Id.*; and must be fairly and understandingly made: *McFadden v. Missouri Pacific R. R. Co.*, 92 Mo. 343; 1 Am. St. Rep. 721; and if both parties have a fair opportunity to understand the terms of the contract entered into, they are bound by it: *Wallace v. Matthews*, 39 Ga. 617; 99 Am. Dec. 473, and note 479. Or if the limitations on a check or ticket are brought to a passenger's notice, and he agrees to such limitation, it then becomes binding: *Baltimore etc. R. R. Co. v. Campbell*, 36 Ohio St. 647; 38 Am. Rep. 617. But it is held that the assent must be in express terms: *Western Transp. Co. v. Newhall*, 24 Ill. 466; but see *Logan v. Ponchartrain R. R. Co.*, 11 Rob. 24; 43 Am. Dec. 199. It has been decided that a bill of lading given by a carrier on receipt of goods, and accepted by a shipper, is a special contract: *Steele v. Townsend*, 37 Ala. 247; 79 Am. Dec. 49, and note 57; *McMillan v. S. & N. I. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208, and note 227; *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117; but see *Adams Express Co. v. Stettaners*, 61 Ill. 184.

LIMITATION OF CARRIER'S LIABILITY MUST BE REASONABLE. — The limitation of a common carrier's liability by express contract must be reasonable in itself, and not such as to operate as a snare or fraud upon the public; must be fully understood by the other party, and clearly proved: *Adams Express Co. v. Nock*, 2 Davall, 532; 87 Am. Dec. 510; *Baltimore and Ohio R. R. v. Rathbone*, 1 W. Va. 87; 88 Am. Dec. 664; *Adams Express Co. v. Reagan*, 29 Ind. 21; 92 Am. Dec. 332, and note 336. Therefore the condition that the carrier should not be liable for loss, unless a claim therefor should be presented within thirty days from the date of the receipt, was declared to be unreasonable and void, in a contract to carry a package from Indiana to Georgia, during the war, and when transportation was much interrupted: *Adams Express Co. v. Reagan*, 29 Ind. 21; 92 Am. Dec. 332, and note 336. But a railroad company, as common carrier of animals, may by contract limit its liability for loss, by stipulating that a shipper shall not maintain an action against it for damage after forty days shall have elapsed from the time when the cause of

action arose, though such time is shorter than that named in the statute of limitations. Such contract is valid if founded upon sufficient consideration, and reasonable in its terms: *Gulf etc. R. R. Co. v. Trawick*, 68 Tex. 314; 2 Am. St. Rep. 494. So the carrier may provide that he shall only be liable for damage or loss while the goods are in his own custody: *Weinberg v. Albenmarle etc. R. R. Co.*, 91 N. C. 31; and there may be a contract which will exempt the carrier for liability for loss of a special class of goods, as jewelry, unless its value be stated and extra freight paid: *The Bermuda*, 23 Blatchf. 554.

EXEMPTION FROM LIABILITY FOR NEGLIGENCE BY NOTICE, ETC. — Public policy forbids that a common carrier should be allowed to contract for exemption from liability for damage occasioned by the negligence, willful default, or tort of himself or his servants: *Mobile etc. R. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607; *Pennsylvania R. R. Co. v. Raiordon*, 119 Pa. St. 577; 4 Am. St. Rep. 670; *Pennsylvania R. R. Co. v. Miller*, 87 Pa. St. 395; *Baltimore etc. R. R. Co. v. Skeels*, 3 W. Va. 556; *Carroll v. Missouri Pacific R'y Co.*, 88 Mo. 239; *Louisville etc. R. R. Co. v. Oden*, 80 Ala. 38; *Gulf Colorado etc. R. R. Co. v. McGown*, 65 Tex. 640; *Evansville etc. R. R. Co. v. Young*, 28 Ind. 516; *Grogan v. Adams Express Co.*, 114 Pa. St. 523; *McFadden v. Missouri Pacific R'y Co.*, 92 Mo. 343, 348; 1 Am. St. Rep. 721; *Illinois etc. R. R. Co. v. Adams*, 42 Ill. 474; 92 Am. Dec. 85; *Seller v. Pacific Co.*, 1 Or. 409; *Pennsylvania R. R. Co. v. McCloskey*, 23 Pa. St. 526; *Branch v. Wilmington etc. R. R. Co.*, 88 N. C. 573; *Southern Express Co. v. Moon*, 39 Miss. 822; *Farnham v. Camden etc. R. R. Co.*, 55 Pa. St. 526; *Georgia R. R. Co. v. Gann*, 68 Ga. 350; *Chicago etc. R. R. Co. v. Moss*, 60 Miss. 1003; *Roberts v. Riley*, 15 La. Ann. 103; 77 Am. Dec. 83; *Graham v. Davis*, 4 Ohio St. 362; 62 Am. Dec. 285, and note 294; *Southern Express Co. v. Purcell*, 37 Ga. 103; 92 Am. Dec. 53; *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239; 93 Am. Dec. 162, and note 167; *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117; *Chicago etc. R. R. Co. v. Abels*, 60 Miss. 1017; *Little Rock etc. R. R. Co. v. Talbot*, 39 Ark. 525; *Rose v. Des Moines etc. R. R. Co.*, 39 Iowa, 246; *Ohio etc. R. R. Co. v. Selby*, 47 Ind. 471; *Michigan etc. R. R. Co. v. Heaton*, 37 Id. 448; *Goldney v. Pennsylvania R. R. Co.*, 30 Pa. St. 242; *Empire etc. Co. v. Wamsutta etc. Co.*, 63 Id. 14; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 338; *Bank of Kentucky v. Adams Express Co.*, 93 Id. 174; *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349, and note 363; *Levering v. Union etc. Co.*, 42 Mo. 88; 97 Am. Dec. 320, and note 325. Nor may a carrier contract so as to exempt himself from want of care: *Indianapolis etc. R. R. Co. v. Cox*, 29 Ind. 360; 95 Am. Dec. 640. So printed notices, receipts, and regulations even, when brought to shipper's notice and assented to by him, will not excuse the carrier from liability for a failure to use ordinary care in transporting them: *Mann v. Birchard*, 40 Vt. 326; 94 Am. Dec. 398, and note 402; *Adams Express Co. v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57; *Mobile etc. R. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607, and cases above cited. In some of the New York cases it is held that the carrier may, by a contract expressed in unequivocal terms, even exonerate himself from liability for gross negligence: *Maynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 180; 27 Am. Rep. 28; *Cragin v. New York etc. R. R. Co.*, 51 N. Y. 61; 10 Am. Rep. 559; *Poucher v. New York etc. R. R. Co.*, 49 N. Y. 263; 10 Am. Rep. 364; *Bissell v. New York etc. R. R. Co.*, 25 N. Y. 442.

NOTICES, ETC., AS MAKING CONTRACT IN FAVOR OF CARRIERS OF PASSENGERS. — It should be borne in mind that the same responsibility does not attach to carriers of passengers as to common carriers, except in regard to

baggage; it is only on the ground of negligence that carriers of passengers are held liable: 2 Greenl. Ev., 13th ed., secs. 221, 222. The law requires that railroad companies, as carriers of passengers, should exercise the highest degree of care and prudence, and they are liable for the slightest neglect: *Peters v. Rylands*, 20 Pa. St. 497; 59 Am. Dec. 746; *Gillenwater v. Madison etc. R. R. Co.*, 5 Ind. 339; 61 Am. Dec. 101; *Moore v. Des Moines etc. R. R. Co.*, 69 Iowa, 491. So that, in determining the right of a carrier of passengers to exempt itself from liability by notice, words on tickets, etc., reference must always be had to the degree of responsibility attaching to their contract of carriage. It is held in *Kent v. Baltimore etc. R. R. Co.*, 45 Ohio St. 284, 4 Am. St. Rep. 539, that a purchaser of a railway passenger ticket does not, by its mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon, in the absence of actual knowledge of them, although he bought the ticket at a rate reduced from the regular fare, but at the rate usual to the class of passengers to which he belonged; and there is no irrebutable presumption that one who takes passage upon a limited railroad ticket, the limit of which has expired, is informed of the rules and regulations of the company prohibiting the use of such ticket, by his paying to the conductor of the train the difference between the redemption value of the ticket and a full fare, when no such prohibition appears upon the ticket: *Arnold v. Pennsylvania R. R. Co.*, 115 Pa. St. 135; 2 Am. St. Rep. 542. Though a condition in a ticket, to which the passenger has assented, that it should not be good for certain trains, does not entitle the passenger to ride on those trains, although subsequent to the purchase of the ticket the company had advertised that passengers "with tickets" might ride thereon. In this case, the ticket was of the special kind known as "mileage tickets": *Dunlap v. Northern Pacific R. R. Co.*, 35 Minn. 203; *Howard v. Chicago etc. R. R. Co.*, 61 Miss. 194. It is held in New York that a carrier of passengers may limit the time upon its ticket within which it may be used, and may also specify thereon that the trip shall be continuous, and that such provision on the ticket is evidence of a contract to that effect: *Barker v. Coffin*, 31 Barb. 556. So a purchaser of a railroad ticket, who accepts and uses the same, is bound by a condition printed thereon that it is good "for a continuous trip only," and "is not good to stop off": *Johnson v. Philadelphia etc. R. R. Co.*, 63 Md. 106; see also *Pennington v. Philadelphia etc. R. R. Co.*, 62 Id. 95. In this last case the court said: "A passenger has the right to be conveyed in the cars of a railroad company without making any special contract for transportation. . . . It is competent to vary these obligations by a special agreement on valuable consideration between the passenger and the company. . . . The mere purchase of a ticket does not constitute a contract. Before the ordinary liability of the railroad company can be varied, there must be a consent of the passenger, founded on a valuable consideration. The ticket ordinarily is only a token showing that the passenger has paid his fare; but where the ticket is sold at less than the usual rates, on the condition that it shall not be used after a limited time, if the passenger accepts and uses the ticket, he makes a contract with the company according to the terms stated, and the reduction in his fare is the consideration for his contract. . . . The railroad company agrees to carry him at the reduced rate upon the conditions stated on the face of the ticket. If he agrees to those terms, the contract is consummated." But the rule in Pennsylvania is limited, since it is there held that general public notice given in the ticket-office, and by posters, circulars, etc., of the regulations of a railroad company, relating to the length of time for which excursion tickets could be used and remain

good, is not admissible to show actual knowledge of such regulation by the purchaser, in the absence of any notice on the ticket itself: *Pennsylvania R. R. Co. v. Spicker*, 105 Pa. St. 142. But see *Lake Shore etc. R'y Co. v. Rosenzweig*, 113 Id. 519, where it is said that "the plaintiff's ticket was evidence of the payment of his fare, and of his right to be carried according to its terms. It did not express the whole contract. What it does not set forth may be ascertained from the reasonable rules and regulations of the defendant; and the holder of the ticket is bound to inform himself of such regulations respecting the conduct of trains and the rights of passengers."

NOTICES, ETC., RESTRICTING LIABILITY OF CARRIERS OF PASSENGERS FOR TORT OR NEGLIGENCE. — A railroad company cannot contract for exemption from liability to a passenger for damage resulting from its own willful misconduct, or that degree of recklessness which is its equivalent: *Perkins v. New York Central R. R. Co.*, 24 N. Y. 196; 82 Am. Dec. 282, and note 290. So a person riding free, and in baggage-car of train, with knowledge of the conductor, is not, by reason of such facts, precluded from recovering for an injury caused by a collision, even though he might not or would not have been injured had he remained in the passenger-car: *Washburn v. Nashville etc. R. R. Co.*, 3 Head, 638; 75 Am. Dec. 784. The rule that a common carrier cannot exempt himself by special contract from liability for tort or negligence of himself or his servants applies where he undertakes to transport passengers gratuitously on a ticket which contains a stipulation that, in consideration of such free passage, the passenger assumes all risk of accident, and agrees that the carrier shall not be liable therefor, whether resulting from negligence of its servants or otherwise: *Pennsylvania R. R. Co. v. McCloskey*, 23 Pa. St. 532; *Illinois etc. R. R. Co. v. Read*, 37 Ill. 484; *Prince v. International etc. R. R. Co.*, 64 Tex. 144; *Mobile etc. R. R. Co. v. Hopkins*, 41 Ala. 489; 94 Am. Dec. 607; *Jacobus v. St. Paul etc. R. R. Co.*, 20 Minn. 125; *Indiana etc. R. R. Co. v. Mendy*, 21 Ind. 48; *Gulf Colorado etc. R. R. Co. v. McGown*, 65 Tex. 640; but see *Annas v. Milwaukee etc. R. R. Co.*, 67 Wis. 46; 57 Am. Rep. 388, and note; *Wells v. New York etc. R. R. Co.*, 24 N. Y. 181; *Kinney v. Central R. R. Co.*, 34 N. J. L. 513. But the case of *Norton v. Western R. R. Corp.*, 15 N. Y. 444, 69 Am. Dec. 623, limits the liability to cases where the injuries are sustained by the passenger without his own fault, and through culpable negligence of the company, and puts the liability, not upon the contract, but upon the public duty of the company to furnish its passengers safe carriage. It was decided as late as 1885, in Missouri, that a drover riding on a free pass to take care of his stock may recover for injury sustained by the carrier's negligence, although the pass provided that he took his own risk of personal injury from any cause whatever, and he signed a release to that effect: *Carroll v. Missouri R'y Co.*, 88 Mo. 239; 57 Am. Rep. 382, and note 388, where the points involved are considered *in extenso*, and the editor arrives at the same conclusion, evidently, as in the Carroll case. But the *contra* is held in New York, however, and in a case where the plaintiff shipped his cattle under an agreement that carriage for himself should be free, and in pursuance thereof received a drover's pass, which provided that its acceptance should be considered "a waiver of all claims against the company for personal injury received when on the above train," and he was injured by the negligence of defendant's servant, it was held that no liability attached: *Poucher v. New York etc. R. R. Co.*, 49 N. Y. 263; 10 Am. Rep. 364, and note 366; see also *Griswold v. New York etc. R. R. Co.*, 53 Conn. 371; 55 Am. Rep. 115. And it was decided in *Perkins v. New York etc. R. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 282, and note 290, that a railroad company may,

by contract, exempt itself from liability to a gratuitous passenger for any degree of negligence in its servants or agents, other than its directors or managing officers, who are to be considered as identical with the company itself.

UPON WHOM BURDEN OF PROOF TO SHOW NOTICE, ETC., RESTS. — "In every case of public notice the burden of proof is on the carrier to show that the person with whom he deals is fully informed of its tenor and extent; . . . and in an action against a carrier, the defendant must satisfy the jury that the notice was actually communicated to the plaintiff. If it was posted up or advertised in a newspaper, it must appear that he read it. In the latter case, the advertisement affords no ground for an inference of notice, unless it be proved that the plaintiff was in the habit of taking or reading the newspaper in which it was inserted, and even then the jury are not bound to find the fact": 2 Greenl. Ev., 13th ed., sec. 216. So the burden of proof is on the carrier to show the agreement: *Baltimore and Ohio R. R. Co. v. Campbell*, 36 Ohio St. 647; 38 Am. Rep. 617. And the burden is upon the carrier notwithstanding an exception exempting him from liability for loss by fire, to show that the accident did not occur through any fault or negligence on his part or on the part of his agents or employees: *Levering v. Union Transp. etc. Co.*, 42 Mo. 88; 97 Am. Dec. 320, and note 325. The rule on this point is stated as follows in *Pennsylvania R. R. Co. v. Raiordon*, 119 Pa. St. 577, 4 Am. St. Rep. 670: "At common law, if property was lost or injured while in the hands of the carrier, the burden of proof was on the carrier to show the existence of such circumstances as were sufficient to excuse him from liability. Such is still the general rule; but when a special contract is entered into between the shipper and the carrier, the contract takes the place of the common-law rule, and fixes the liability of the carrier."

NEGLECT OR FAILURE TO READ NOTICE, ETC. — The fact that consignor did not read bill of lading delivered to him, which contained restrictions of the carrier's liability, does not, in those states where such restriction may be so imposed, prevent his being bound by its terms, if there was no fraud practiced upon him: *McMillan v. S. & N. I. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208, and note 227; *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117; *Steers v. Liverpool, N. Y., & P. Steamship Co.*, 57 N. Y. 1, 5; 15 Am. Rep. 453.

ATCHISON, TOPEKA, AND SANTA FE RAILROAD COMPANY v. SADLER.

[38 KANSAS, 123.]

VERDICT WILL NOT BE DISTURBED where the record shows that the questions in issue were fairly presented upon the trial, that substantial justice has been done, and it also appears that the instructions of the court and the general verdict are characterized by an absence of passion and prejudice, unless there are such grave and material errors as absolutely compel a reversal.

EVIDENCE. — IN ACTION AGAINST EMPLOYER FOR INJURY CAUSED EMPLOYEE in using defective tool, fellow-workmen may testify to the actual condition of such tool, describing its defects; also that they had worked with it, and that it was unsafe at the time of the accident.

EVIDENCE. — KNOWLEDGE BY EMPLOYER OF UNSAFE CONDITION OF DEFECTIVE TOOL, causing injury to employee, may be proven by the testimony of a fellow-workman that he had told the foreman having charge of the work that the tool was unsafe.

EMPLOYER — PROMISE TO FURNISH NEW TOOLS IN PLACE OF DEFECTIVE ONES — NEGLIGENCE. — Where a railroad company had knowledge that tools in use by its workmen were defective, and through its foreman promised to furnish them new ones, an individual employee in whose presence and hearing the promise is made has a right to rely thereon, and is entitled to its benefit. In such case, if a reasonable time has expired within which new and perfect tools ought to have been furnished, permitting their continued use is gross negligence, and employee injured in using them may recover therefor.

INSTRUCTIONS AFFORD NO GROUND OF COMPLAINT, where, taking them all together, they so fairly present the question involved that the jury could not be misled, although some of the instructions may by themselves be subject to criticism.

George R. Peck, A. A. Hurd, and J. G. Egan, for the plaintiff in error.

A. Smith Devenney, for the defendant in error.

SIMPSON, C. The material facts as found by the jury in answer to special interrogatories submitted by both parties, and from the evidence, are as follows: William Sadler, a young man, on the thirty-first day of March, 1885, was employed by the Atchison, Topeka, and Santa Fe Railroad Company as a section-hand on section No. 5, in Johnson County, at the rate of \$1.10 per day. He was employed by the foreman, who had authority from the company to employ and discharge section-men, and he worked under the authority and direction of such foreman. Sadler continued in the employment of the company until some time in the month of June, when he was ordered by the foreman to use the spike-maul and drive spikes. Sadler objected to this class of work, and informed the foreman of his inexperience, but he was compelled to work with the spike-maul for more than an hour on that day, and on the next day he worked an hour in the forenoon and until about four o'clock in the afternoon, when a spike flew from under the maul when it struck the spike, and struck Sadler on the left leg, cut the flesh, and fractured the bone; the wound bled profusely, and produced much pain. Two weeks before this time, Burkett and Ball, two of the section-men, in the presence of Sadler had complained to the foreman of the defective and unsafe condition of the tool, and the foreman told them that the company had promised him new tools

for the section, but that they had not come yet. The section-gang were engaged in taking up old rails and replacing them with new ones, and the old spikes were used in fastening the new rails. The spike-maul used by Sadler was an old one, worn on the face, and at one side of the face were "chipped" pieces, or a piece broken out. The spike was an old and greasy iron one, about five inches in length, with about a half-inch bent at the top, and very rusty. Sadler struck the spike with the maul, and the spike flew from under the blow and struck him on the leg. When he commenced to work he looked for a moment at the maul, when the foreman called out to him in a loud voice, "Hurry up; everything is all right"; and he immediately went to work. Immediately after the injury Sadler's attention was called to the condition of the maul by Burkett, a fellow-workman, and they examined it and found that it was not only worn out, but was badly rounded and chipped off from the face. He worked for two days after the injury, driving spikes, and thinking the injury was not serious, when the swelling of the limb and the pain compelled him to quit, and place himself in the charge of a physician.

Sadler testified at the trial that he had attempted to examine the maul before he went to work with it; that he "took it up in this shape" (illustrating), and was looking at it; that he saw the edge was a little rounding, when the foreman halloed out to "Hurry up; everything is all right"; that he then went on without further examination; that it was the same maul which he had used in the forenoon, and used in the afternoon from ten o'clock until he was injured, "along in the evening." The jury, in answer to a special interrogatory, found that the plaintiff below knew prior to the accident that the maul which he was using was defective, on account of having been worn around the edges, and on account of having a small piece chipped out of the face of the maul. They also found that the plaintiff below knew at the time he was hurt that the spike he was attempting to drive was old, rusty, and greasy. There is no complaint or allegation in the petition of the defendant in error that the injury was occasioned by the defective condition of the spike. He bases his right to damages upon the defective condition of the maul. There were eight mauls among the tools which were for the use of this gang of section-men; and the jury found that there were four mauls in use at the time the injury occurred. The findings of the jury may be formulated as follows: —

1. The foreman knew that the maul used by Sadler was defective.

2. The foreman had promised the section-gang, in the presence and hearing of Sadler, to furnish new and perfect mauls.

3. Sadler attempted to examine the maul before he used it, but was commanded by the foreman to "Hurry up; everything was all right."

4. Sadler was inexperienced in the use of a maul, and in driving spikes, and so informed the foreman before he commenced to use the maul.

5. The foreman gave him no instructions as to its use, so as to prevent injury.

6. Sadler was not guilty of any fault, negligence, or want of ordinary care contributing to the injury.

7. The railroad company was guilty of negligence and want of ordinary care in furnishing defective tools and compelling their use.

This case was tried by a jury, with great skill and ability on both sides, and every possible question that could be raised on the state of facts is presented in this record. We want to say in a general way that we are impressed with the unusual fairness of the trial for a case of this character. The general instructions of the court, and the general verdict of the jury, as well as their answers to the special interrogatories submitted by both sides, are all characterized by an absence of passion and prejudice, and a liberal regard for the rights of all, so much to be desired in judicial investigation. We shall not disturb a verdict arrived at by such means, unless there are such grave and material errors as absolutely compel a reversal.

The counsel for the plaintiff in error complain of the admission of the testimony of Burkett; and they say that he was permitted to give his opinion that the spike-maul in use on the section at the time of the accident to Sadler was unsafe. They also complain that the same testimony was given by the witness Weber, over their objection. Both of these witnesses belonged to the section-gang; they both testified that they had worked with the mauls; they both described the condition of the maul used by Sadler at the time of the injury, describing its defects, and stating that it was unsafe. We can see no objection to this. If it was expert evidence, the witnesses had qualified themselves for the expression of opinion. They stated to the jury the actual condition of the maul, and on their

statement the ordinary, common knowledge of the jury would authorize the conclusion that the maul was unsafe. The testimony of the witness Burkett, that he told the foreman that the tools were unsafe, was admissible for the purpose of proving the knowledge of the company of the defective condition of the maul, if for no other purpose. This was one of the material facts which the plaintiff had to establish, and it could be brought to the knowledge of the company in that manner. We see no objection to it. There is no doubt on the evidence but that the company knew that the maul was defective, and through the foreman had promised to furnish the gang new tools. This promise was made in the presence and hearing of Sadler; and we think he had a right to rely on it under the particular circumstances of the case. He would certainly be bound by any general orders or directions given by the foreman to the gang of men with whom he was associated in work on the section: *Union Pacific R'y Co. v. Fray*, 31 Kan. 739. And he ought to have the benefit of any promise made by the foreman to the men with whom he was associated: 2 Thompson on Negligence, 1017; *Perry v. Ricketts*, 55 Ill. 234; *Parody v. Chicago etc. R'y Co.*, 5 McCrary, 38. A sufficient time had elapsed since the attention of the foreman had been called to the defective condition of the mauls in use on the section, for the company to furnish new and perfect tools when this injury occurred; and no attempt is made to explain the delay, or to show that any steps had been taken to replace the mauls. After the defects of the tools have been called to the attention of the company, and a reasonable time has expired within which the company ought to have furnished new or perfect tools, their continued use is gross negligence: *Perry v. Ricketts*, *supra*.

It is highly probable that some of the instructions are subject to criticism, but taking them altogether, they so fairly present the questions raised on both sides that it is almost impossible that the jury could be misled by them to the prejudice of the plaintiff in error. Taking all the circumstances and facts of the case into consideration,—the inexperience of the defendant in error in this particular line of work; his notice to the foreman in that respect; the fact that he was required to work with a defective tool; that he had no sufficient opportunity to examine it; that his attempt to do so was interrupted by the foreman by a command to "Hurry up," coupled with an assurance that "everything was all right";

the neglect of the company, for more than a reasonable length of time, to furnish new tools, after repeated warnings that those in use were defective; the freedom of the jury from passion or prejudice; the evident desire of the court to fully and fairly instruct on all material questions; the verdict of the jury and its approval by the trial court on the motion for a new trial,—we are disposed to think that substantial justice has been done, and no error committed that ought, in the interests of justice and the due administration of the law, to compel a new trial.

It is recommended that the judgment be affirmed.

By the COURT. It is so ordered.

VERDICT WILL NOT BE DISTURBED UNLESS CLEARLY ERRONEOUS: See *Muse v. Stern*, 3 Am. St. Rep. 77, and note; *Reiley v. Haynes*, post, p. 737, and note.

INSTRUCTIONS WHICH, AS A WHOLE, PROPERLY PRESENT THE LAW, will not be ground for reversal because portions thereof are by themselves subject to criticism: See *Lang v. State*, ante, p. 324.

SERVANT CONTINUING IN SERVICE OF MASTER ON LATTER'S PROMISE TO REPAIR defective machinery is not guilty of contributory negligence: See *Indianapolis etc. R'y Co. v. Watson*, ante, p. 579, and note.

SWEENEY v. MERRILL.

[38 KANSAS, 216.]

NEGLIGENCE. — ONE WHO SETS OUT A FIRE UPON HIS OWN LAND IS LIABLE for an injury done by its communication to the property of another, only where he is negligent in setting out the fire, or in not preventing it from spreading outside his own land; nor is negligence to be imputed to him because he did not anticipate a little whirlwind which arose suddenly, and carried the fire beyond his control.

IF ONE IS GUILTY OF NEGLIGENCE IN SETTING OUT FIRE, OR IN HIS ATTEMPTED CONTROL OF IT, it is immaterial whether he was diligent or negligent in attempting to save the destroyed property by back-firing, if in any event such property would have been destroyed.

ALTHOUGH INSTRUCTION IS NOT ENTIRELY PLAIN OR UNAMBIGUOUS, yet if the rule of law attempted to be stated is made clear by the instruction immediately following, there is no ground for reversal.

John T. Bradley, for the plaintiff in error.

A. H. Case, for the defendant in error.

HOLT, C. In March, 1885, the defendant in error, who was also defendant below, set fire to some corn-stalks in his inclosed field, which escaped and swept over to the meadow of the plaintiff, toward his stacks; the defendant, going into the

meadow, set a back-fire to protect plaintiff's stacks, but the fire escaping from him burned them; either the back-fire or the original fire burned up the fence-posts of the plaintiff. He brought his action before a justice of the peace, and upon appeal it was tried in the Pottawatomie district court, at the October term, 1885, by a jury; verdict for defendant, and judgment rendered thereon. Plaintiff brings the case here, and in his brief his complaint is of the instructions of the court. The court, in substance, instructed that before plaintiff could recover he must show by a preponderance of the evidence that the defendant was guilty of negligence in setting out the fire, or in not preventing it from spreading beyond his own land. The court defined the degree of negligence that must exist as ordinary negligence, being an absence or want of that degree of care which men of common prudence generally exercise in their own affairs.

The plaintiff contends that because fire is a dangerous element, any one using it must exercise extraordinary care in its use. We do not think his contention is correct. We believe that it is only necessary for the defendant to use ordinary care in setting out the fire within his own inclosure, and in preventing its escape to the land of others. Of course each case of this kind is to be determined to a great extent upon its own peculiar circumstances, and the acts which might be proper care in one case, in another case, under different circumstances, might not be sufficient. To that extent only, the question of negligence is a question of fact for the jury, the measure of negligence or prudence first being defined by the court.

In this particular case the defendant was burning off his lot, and preparing it for cultivation, and set the fire upon a calm morning; after the fire had started, the wind veered, and there were puffs of wind and a little whirlwind which carried the fire beyond his control. It could not be imputed to the defendant for negligence, because he did not anticipate such a change of the wind.

The plaintiff further complains of the following instruction: "If, however, you find from the evidence that the original fire, set out by the defendant for the purpose of burning stalks on his own land, would, in any event, certainly have caused the burning of the hay-stacks and posts of the plaintiff, then it is wholly immaterial that the defendant undertook to protect the hay-stack by back-firing, and failed in the attempt by negligence or otherwise. In such case, you need only inquire

whether the defendant was guilty of negligence in setting out the original fire, or in not preventing it from spreading beyond his own land; and if you should find from the evidence that he was not guilty of such negligence, you will find for the defendant."

It restricts the finding in favor of plaintiff to the negligence of the defendant in setting out the original fire, or in not preventing it from spreading from his own land, provided that in any event the fire first set out would have destroyed the property of plaintiff without any reference to the attempt of defendant to protect the stacks by back-firing. It provides that if he negligently set out the fire, or if he set it out properly and negligently allowed it to escape from his control, then in any event the defendant would be liable. In other words, if the defendant was guilty of negligence in setting out the fire, or in his attempted control of it, and the fire would have surely burned the stacks of the plaintiff anyhow, it was immaterial whether he was diligent or negligent in attempting to save the property by back-firing, for the reason that in any event such property would have been destroyed. We perceive no error in this instruction prejudicial to the plaintiff.

Instruction No. 5 was as follows: "If the fire originally set out in defendant's corn-stalks had spread from the defendant's land, and was continuing to spread so as in all probability to endanger the hay-stacks of the plaintiff, then the defendant had a right to set out a fire on the land of plaintiff to protect such hay-stacks by back-firing; and if the hay-stacks were destroyed by such back-fire so set by defendant, the defendant would not be liable therefor if he exercised that degree of care which ought reasonably to have been used under the circumstances."

This is the most serious question for consideration in this case. The plaintiff claims that it authorizes the jury to find a verdict for the defendant, even though the defendant was negligent in setting out the fire, or permitting it to escape beyond his land, if afterward he exercised due care in setting out the back-fire. If the instruction necessarily bears this construction, it is erroneous; but does it mean what the plaintiff claims? It does not say so in plain terms. If it is inferred, it is an inference that does not necessarily arise from the language of the instruction. The instruction might be held to mean that he would not be liable for the destruction

of the hay-stacks by the back-fire, if he exercised reasonable diligence in setting it out. The most we feel like saying is, that the instruction was not as plain and unambiguous as it might have been. Moreover, the instruction immediately following this lays down the rule very clearly in regard to the measure of care required, wherein it provides that either negligence in setting out the fire, or allowing it to escape, was sufficient each of itself to sustain an action against defendant. The testimony brought here seems to fairly show that the defendant exercised ordinary care in setting out the fire; did what he possibly could in preventing its escape and spread upon the land of plaintiff, and then, after consulting with others whom he called to his aid to protect the property of plaintiff, pursued what seemed to them all the best policy, in attempting to save the stacks by back-firing.

We perceive no material error in the instructions of the court. These are the sole errors complained of, and therefore we recommend an affirmance of the judgment.

By the COURT. It is so ordered.

AMBIGUITY IN INSTRUCTION IS CURED BY STATEMENT OF CORRECT RULE in another instruction: See note to *Horne v. State*, 81 Am. Dec. 503 et seq.; *Krogg v. State*, 4 Am. St. Rep. 79.

LIABILITY OF ONE SETTING FIRE ON HIS LAND FOR INJURIES FROM COMMUNICATION of fire to premises of others: See *Ryan v. Central R. R. Co.*, 91 Am. Dec. 49, and note. Where sparks from a locomotive set fire to grass, and the fire spread to adjoining property and caused damage, the railroad company was held liable: *Poeppers v. Mo. etc. R'y Co.*, 29 Am. Rep. 518. In *Hoag v. Lake Shore etc. R'y Co.*, 27 Id. 653, where plaintiff's buildings were four hundred feet distant, it was held that the damage was too remote. In *Lehigh V. R. R. Co. v. McKeen*, 35 Id. 644, a case similar to the last, it was held to be a question of fact whether defendant's negligence was the proximate cause of the injury.

REILEY v. HAYNES.

[88 KANSAS, 259.]

REPLEVIN MAY BE MAINTAINED AGAINST SHERIFF who holds property by virtue of a writ in another action of replevin then pending and undetermined, and also against the plaintiff in such suit, where the plaintiff in the latter suit is not a party to the first.

FINDING OF JURY WILL NOT BE REVIEWED if there is any evidence to support it.

EVIDENCE. — DECLARATIONS BY A PARTY IN POSSESSION OF PERSONAL PROPERTY AS TO OWNERSHIP THEREOF, accompanying some principal fact which they serve to explain and qualify, are sometimes said to be a part
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of the *res gesta*, and with the proper limitations and restrictions may, in certain cases, be permitted to go in evidence; but witnesses may not be allowed to state the common understanding in the neighborhood, or the general reputation as to ownership.

PRACTICE — **MOTION TO STRIKE OUT ANSWER OF WITNESS.** — When an improper answer is given to a legitimate question, or where a part of the answer is improper, the party complaining must move to strike out the answer, or the improper part, or it will not be reviewed.

T. M. Noble, for plaintiffs in error.

T. C. S. Cooper, and Van Natta and Close, for the defendant in error.

SIMPSON, C. The plaintiffs in error commenced an action of replevin against James H. Haynes and George Schaaf for the recovery of the possession of certain specific personal property, alleging that they were entitled to the possession of said property by virtue of default in the terms and conditions of certain chattel mortgages, executed by Haynes and Schaaf to them on said property. While this action was pending and undetermined, Martha J. Haynes, the wife of James H. Haynes, who claims to be the absolute owner of the property, commenced her action in replevin to recover the possession of the identical property from T. C. Reiley, the sheriff of the county, who held the property by virtue of the writ in the first action, and Richard Hunter, who was plaintiff in the first action, and to whom the chattel mortgages had been given. The case was tried by a jury at the June term, 1886, and there was a verdict and judgment for Mrs. Haynes for the recovery of the possession of the property, its value at the time of detention being found at \$867.50, and damages for detention in the sum of \$290, and costs. A motion for a new trial was overruled, and the case is here with several assignments of error occurring during the trial.

1. The first is (and it is doubtful on the record whether it was ever raised and passed upon by the court below), that at the time of the commencement of this action the specific personal property was in the custody of the court, and that by the reason of that fact, replevin at the suit of a third party would not lie. This identical question was passed upon by the court in the case of *Gross v. Bogard*, 18 Kan. 288, and as Mrs. Haynes claims adversely to both her husband and Hunter, the decision controls this action. Mrs. Haynes can maintain this action in replevin against the officer and Hunter, at whose suit the former process issued under which the sheriff claims possession.

2. The next proposition of counsel is, that the evidence is not sufficient to entitle Mrs. Haynes to recover. If we should undertake to determine this question in a precise and formal manner, it would be the trial of issues of fact in this court. The jury and the trial court have determined that there was sufficient evidence to entitle her to a recovery. If there is any evidence to support the finding of the jury and the judgment of the court, it is sufficient here. We shall not weigh the evidence, nor undertake to determine the credibility of the witnesses. There were no special findings required of the jury; the general instructions of the court to the jury were not excepted to, and the whole record of the proceedings denotes that there was a free, fair, and full trial, with considerable latitude allowed in the introduction of evidence, so that we have no doubt but that both the court and jury were fully advised as to all the facts in the case.

3. It is said that the testimony of Mackay, Julius Beecher, Ole Beecher, A. C. McPherson, and Charles Blackburn, or rather certain parts of it, ought not to have been permitted to go to the jury. This testimony consists of the statements of persons living in the neighborhood of Mrs. Haynes, and knowing her ever since she came to Republic County, who testified to the declarations of herself and her husband, when they first moved into the neighborhood, as to the ownership of this specific personal property; that she had always claimed to be the owner of it, had always said so; that it was generally understood in the neighborhood that she was the owner; that by reason of these things, it was a matter of reputation, generally known, that she was the owner of the stock; Haynes was her second husband, and she owned the stock before her marriage to him; that these statements as to the ownership were made while the stock was in the possession of Mrs. Haynes, as well by her as by her husband; that she had borrowed money in town on the fact of her ownership. These facts all had a tendency to support her claim, and divest the jury of an impression that her claim of ownership was being used for the sole purpose of saving the property from a chattel mortgage executed by her husband. Declarations by a party in possession of personal property as to the ownership thereof, accompanying some principal fact which they serve to explain and qualify, are sometimes said to be a part of the *res gestæ*: *Stone v. Bird*, 16 Kan. 488, and authorities cited. This case will be found to be very similar, in the particular fea-

tures which we are now considering, to the one at bar, and all the criticisms of Mr. Justice Brewer on the manner in which the objections to the evidence were presented in that case apply with equal force in this. The single issue in this case is, Was Mrs. Haynes the owner and entitled to the possession of the property in suit? Her declarations while she was in possession of the property, made for successive years before this controversy arose, was some evidence to go to the jury, under the proper limitations and restrictions, in support of that issue. So the declarations of Haynes, with the same safeguards, might go in evidence, and those of George Schaaf are permissible, for they are both parties to the inquiry, represented by the sheriff, and their declarations in disparagement of their own title, and in support of that of Mr. Haynes while in possession and control of the property, can be shown. But this rule must be kept within safe and reasonable limits, and it is extended too far when witnesses are allowed to state the common understanding of the neighborhood, or the general reputation as to ownership. This was done by several witnesses in their answers to questions to which they did not make direct responses, but there was no motion to strike out such answers and withdraw them from the jury. The necessity for such a course was very clearly pointed out by the court in the case of *Stone v. Bird*, *supra*, and it is stated that a mere objection to its reception was not enough; but not even that was done in this case. When an improper answer is given to a legitimate question, or where a part of the answer is improper, the party complaining must move to strike out the answer, or the part he considers improper, in order to have it reviewed in this court. In this case, witnesses were allowed to make remarks, and refer to the knowledge of the neighborhood, and make statements about "reputation of ownership," by addition to proper answers to questions, and possibly, in one or two instances, to questions so framed that such answers could be made. But these things are all mixed up with what appears to be the other and material matter, and we cannot say affirmatively that there is error.

We recommend that the judgment of the district court be affirmed.

By the COURT. It is so ordered.

FINDING OF JURY WILL NOT BE REVIEWED IF THERE IS ANY EVIDENCE TO SUPPORT IT: See *Fears v. Alhea*, *ante*, p. 337; *Bockenstedt v. Perkins*, *ante*, p. 651; *Swayne v. Waldo*, *ante*, p. 712.

REMEDY, WHEN WITNESS GIVES IMPROPER ANSWER, IS BY MOTION TO STRIKE IT OUT: See *Taylor v. Newburgh*, 4 Am. St. Rep. 453.

ADMISSIBILITY OF DECLARATIONS AS PART OF RES GESTÆ is fully discussed in the note to *People v. Vernon*, 95 Am. Dec. 51-76.

REPLEVIN DOES NOT LIE FOR PROPERTY IN CUSTODIA LEGIS: See *Lewis v. Buck*, 82 Am. Dec. 73; *Booth v. Ableman*, 84 Id. 711; *Hagan v. Deuell*, 88 Id. 769.

JAMES v. DUNSTAN.

[88 KANSAS, 289.]

ELECTION TO TAKE UNDER WILL. — The Kansas statute in relation to probating wills, and the election of the widow to take thereunder, specifically points out the course to be pursued when she has not consented in writing to the will, and a substantial compliance therewith is necessary to make such election binding.

ACTION of ejeement. One John James, deceased, possessed of certain real estate, and leaving a will. His widow, Elizabeth James, at the time the will was probated, was suffering from ill health, and was unable to appear in court. She, however, sent a verbal message to the executor, expressing her desire to take under the will, and her intention to be in court when able. It was also found that the terms of the will were satisfactory to her; that she had expressed a desire that the same should be carried out, and the property disposed of after her death to the persons therein named. The other facts sufficiently appear in the opinion. Judgment was rendered giving plaintiffs possession of the land, and defendants brought the case to this court.

Samuel Kimble, for the plaintiffs in error.

Green and Hessin, for the defendants in error.

CLOGSTON, C. Two questions are raised by the record in this case: 1. Did Elizabeth James, by her acquiescence and verbal declarations, so accept the provisions of the will as to make it binding upon her heirs? 2. If so, did the will convey to Emma James the property at the death of Elizabeth James? But as a decision on the first proposition is decisive of this case, we shall not consider the second. Our statute in relation to probating wills, and the election of the widow to take thereunder, specifically points out the course to be pursued, and a substantial compliance therewith must be made in order to make an election to take under the will binding. In this case,

it is conceded that no such election was made as is pointed out by statute, and that the widow did not consent in writing to the will. Section 41 of chapter 117, Compiled Laws of 1885, provides that if any provision is made in the will for the widow, and she has not consented thereto in writing, the probate court shall issue a citation to her to appear and make her election, and this election shall be made within thirty days of such citation. Section 42 provides that such election of the widow shall be made by her in person before the probate court, except in case of sickness, and that the court shall make known to her the provisions of the will and her rights under the law; and if no election is made, that she shall retain her share of the estate under the law as if her husband had died intestate. Section 43 provides that in case the widow shall be unable to appear in the probate court on account of sickness or ill health, it shall be the duty of the probate court, on application made on her behalf, to issue a commission, with a copy of the will annexed, to some suitable person to take her election, which person must explain to her her rights under the will and under the law. Nothing was done looking toward an election as is contemplated by these sections, and nothing was done by her in regard to the property that would have estopped her, had she been cited as the law requires, from making her election to take under the will. The time had expired in which to make her election, and yet no request was made by her for a commission to take such election; no request to the court in writing was made that she desired to take under the will.

Counsel for plaintiffs in error insists that *Sill v. Sill*, 31 Kan. 248, is decisive of this case. In this claim we think counsel is mistaken. In that case something was done by the widow toward claiming under the will; a person was appointed to draw up her request, which was signed by her. This appointment, it is true, was irregular, and perhaps also the manner of its execution; but it was an attempt to comply with the statute, and the court held in that case that it was not sufficient to make an election. In this case nothing but a verbal message from the widow to the probate court was given, and it was not shown that she knew what her rights were under the law. It is perhaps true in this case that her rights under the law were substantially the same as under the will, but no presumptions can be indulged in as to her knowledge of this fact.

In *Stilley v. Folger*, 14 Ohio, 610, the court said: "The property mentioned in the agreement, and devised by the will, was received by Mrs. Folger within the time limited to make an election. This was not denied. It was in fact taken very soon after the dissolution of her husband, and in hot haste, though the evidence leaves the fact perfectly clear that his eyes were fully closed before she either seized the property or even announced her intention to break the will. Such an act, however, is not an election, nor can it be proved in this way. An election must be made known to the court of common pleas of the proper county, and the record, unless lost or destroyed, is the only evidence by which it can be established, because it is the best proof of which the nature of the case admits."

Also in *Millikin v. Welliver*, 37 Ohio St. 460, it was said: "It is believed no case can be found where the facts are held sufficient to amount to an election to waive the widow's rights under the law, unless they are of such a marked character and of such long duration as will clearly and distinctly evince a purpose to take the provisions of the will, and to operate as an effectual equitable bar to dower."

The widow must therefore be deemed to have failed to make her election to take under the will. The law provides, in such a case, that the widow shall take such share of the husband's estate as she would have been entitled to had he died intestate; and as he left no issue, under the law the widow would take his entire property, both real and personal; and as she died intestate, the plaintiffs (defendants in error) became the owners of the property in controversy, and are entitled to its possession.

We therefore recommend that the judgment of the court below be affirmed.

By the COURT. It is so ordered.

APPLICATION OF WIDOW FOR LETTERS TESTAMENTARY was held to be sufficient to inform court of her election to take under the will: *Morgan v. Dodge*, 82 Am. Dec. 213.

ST. LOUIS, KANSAS, AND ARIZONA R'Y CO. v.
CHAPMAN.

[38 KANSAS, 307.]

EVIDENCE — OPINION OF WITNESSES AS TO VALUE OF LOTS CONDEMNED FOR RAILROAD COMPANY — INSTRUCTIONS. — Where property has a market value, the rule is strict, and requires only that value to be shown; but where it is shown that property is without a market value, it may then be compared with other property, and its value determined by persons who are shown to be judges, or who have knowledge of the values of real estate in that vicinity, or who have had experience in dealing, both before and after the appropriation, in lots near by, and an instruction that the jury might, in such case, consider such opinions of witnesses, and upon the whole evidence were to be guided by their observation of the property as shown them, and so determine its fair market or real value, is not erroneous.

APPEAL by one Charles W. Chapman to district court from appraisement for city lots condemned by commissioners, and taken by railroad company for right of way. Trial to the jury, and judgment for Chapman to recover fifteen hundred dollars and interest, from which judgment the railroad company brought the case to this court.

W. A. Johnson, for the plaintiff in error.

A. Bergen and L. K. Kirk, for the defendant in error.

CLOGSTON, C. The errors complained of are, that the witnesses who were permitted to testify as to the value of the lots appropriated were nor competent to testify; and second, that the court erred in its instructions to the jury in relation to the question of value and rule of damages. The objection to the competency of the witnesses by the defendant below arose, not from want of a general knowledge of values in the community by the witnesses, or even of a knowledge in a general way of the value of the lots appropriated, but because of the fact that the witnesses showed that they were not acquainted with the market value of the lots at the time they were appropriated, for the reason that there was at that time no market value on the lots. Counsel insists that the rule of damages is the market value of the lots at the time they were taken. This is true where the property taken has a market value. This, then, presents the question, Can the value of property be shown in absence of a market value? It was shown by the witnesses that they were residents of the city of

Garnett, and that this addition adjoined and was part of the city; that they had resided in Garnett for a number of years, and were well acquainted with the property in controversy, and acquainted with the general values of lands at Garnett and in that vicinity at the time this land was appropriated; and a number of them testified that for a number of years prior to and at the time of this suit they were engaged in the land business, and were dealing in real estate in that vicinity; that this property at the time it was appropriated had no market value; that they arrived at the value of lots from a comparison with the value of other lots and sales made in Garnett, and also from sales of lots made in this addition before and after the land was appropriated, and from their general knowledge of the values of property.

There was, however, a special objection made to the competency of the defendant in error as a witness. He showed that he had never resided in Kansas; that he had owned this land, known as the Chapman addition, since 1867, and had been well acquainted with it since that time; that he platted the land and fixed the prices of the lots; that he had sold some thirty or forty lots in said addition at the prices so fixed by him; that he was acquainted with the values of land and city property in and about Garnett at the time these lots were appropriated by the railway company; that he did not know of any market value for the lots at the time they were appropriated. Upon this foundation, he was permitted to testify to the value of the lots so taken. In this we see no error. The fact that there was no market value of the lots in defendant's addition would not warrant the railway company in appropriating them without compensation. The law does not presume or require impossibilities; it only demands and requires the best proof under the circumstances of each case. Where property has a market value, the rule is strict, and requires only that value to be shown; but where it is shown that the property is without a market value, then the law allows the next best evidence to be given to ascertain its value. The property then may be compared with other property; its value may be determined by persons who are shown to be judges, or who have knowledge of the values of real estate in that vicinity, and their opinions may be given of the value of the property, which in this case was the best evidence it was possible to procure. Some classes of property always have a market value;

other property, by reason of its location, or distance from market, or other circumstances, is without a market value; nevertheless it has a value, though the means of ascertaining it is changed where the rule requiring market value cannot be applied. In *L. T. & S. W. R'y Co. v. Paul*, 28 Kan. 821, Judge Brewer, speaking for the court, says: "While, on the other hand, the values of real estate, especially in localities where there are few changes in property, are not so absolutely certain, and cannot be determined with absolute exactness; and in respect to them the testimony of witnesses partakes largely of the nature of opinions. And yet from the necessities of the case it has come to be recognized that such testimony is competent. It is the best that, in the nature of things, can be obtained; for a description by a witness of the locality of any given tract, its improvements and surroundings, would ordinarily throw little light upon the question of its value. So many things enter into and affect such value that a witness would be unable to describe them all, or even to comprehend them all fully. Hence it has become pretty generally established that a witness who testifies that he is acquainted with the values of real estate in the locality may give his opinion as to the value of any particular tract." See also *Atchison etc. R. R. Co. v. Stanford*, 12 Kan. 380; 15 Am. Rep. 362; *Kansas Central R'y Co. v. Allen*, 24 Id. 33.

On the question of the values and the rule by which to determine the defendant's damages, the court instructed the jury as follows:—

"4. In determining the value of plaintiff's lots appropriated as right of way, you are to consider the fair market value of the lots taken as to the time of the taking. This does not necessarily mean what it would bring at forced sale, or under peculiar circumstances; but such sum as the property is worth in the market; that is, to persons generally, if those desiring to purchase were found who were willing to pay their just and fair value.

"5. If you should find that there was no market for such property at the time, it does not follow that they were worthless, or could be appropriated without fair compensation. You should inquire what was its actual value, its reasonable worth; you should consider its reasonable worth in the hands of a prudent seller, at liberty to sell, at a reasonable time for selling, and usual and reasonable terms and conditions of sale: taking

in view the location of the lots and the purposes for which they were held. You should determine such value as the same would be determined by a prudent seller or purchaser. In arriving at this value the opinions of witnesses are taken. Of course the value of their opinions depends upon the means of knowledge, experience, and observation that the witnesses are shown to possess. You are not concluded by these opinions of one or more witnesses. You should consider the location, surroundings, the value of other lots in the vicinity at the time, and determine such value from a careful comparison and consideration of the whole evidence, guided by your own observation of the location and situation, as shown by the view you have had of the premises. Of course you will not fix the value from your own knowledge, or opinions formed upon the view, but will make use of your observation in weighing and considering the testimony offered, and applying it to the case. You should not be influenced by any estimate of the owner, based upon fancy, local attachments, or otherwise; neither should you base your estimate upon forced sales made under circumstances of hardship."

In these instructions we see no error. It was a direction to the jury to determine the market value of the property, in the first instance, and if they found that there was no market value at the time the property was so taken and condemned, then they might consider the evidence of the reasonable worth of the same in the hands of a prudent seller, or a person desiring to purchase, and that in arriving at this value the opinions of the witnesses are to be taken, and that the value of the opinion depended upon the knowledge, experience, and observation of the witness; also, that they were to consider its situation, surroundings, and the value of other property in that vicinity, and upon the whole evidence they were to be guided by their observation of the property, as shown to them, and from all this testimony and observation they were to determine its fair market value, or real value. This instruction seems to us to have been eminently fair and reasonable under the facts as shown in this case. This disposes of all the substantial claims of error in the record. All the other questions related to the damages allowed to the remainder of the addition not appropriated, which was by the defendant remitted after verdict, and therefore it is not necessary to examine any claim of error in the evidence or the instructions of the court therein.

We therefore recommend that the judgment of the court below be affirmed.

By the COURT. It is so ordered.

OPINIONS OF WITNESSES ARE ADMISSIBLE TO PROVE VALUE OF LAND TAKEN BY RAILROAD COMPANY under right of eminent domain: *Little Rock etc. R. R. Co. v. Woodruff*, 4 Am. St. Rep. 51, and note.

SANFORD v. WEEKS.

[38 KANSAS, 819.]

TIME IS NOT OF THE ESSENCE OF A CONTRACT FOR THE SALE OF LAND when such contract is simply an agreement to convey upon the payment of a certain amount at a specified time; and a conveyance of the title may be decreed upon the tender of the price and interest within a reasonable time. Where time is not stated as of the essence, courts are reluctant to enforce forfeitures.

IMPROVEMENTS — ADVERSE POSSESSION — NOTICE. — The mere fact that one takes possession of land with the owner's consent, makes a few improvements thereon, and then enters into an agreement for the purchase of the legal title, does not constitute that open, notorious, unequivocal, and exclusive possession under an apparent claim of ownership which is notice to a *bona fide* purchaser of the legal title, who goes into actual possession, and makes other and permanent improvements; and if such agreement is not acknowledged, filing it for record does not impart notice.

ACTION to quiet title. The agreement in question was to convey by warranty deed certain land therein described, for a sum stated, to one E. H. Sanford, and contained this clause: "The said Sanford agreeing to pay the said sums of money in thirty days from this date to the undersigned or her order," and was signed S. E. Bartholomew.

E. H. Sanford, for himself, as plaintiff in error.

George G. Cornell and A. H. Case, for the defendants in error.

HORTON, C. J. This was an action brought by Ephraim H. Sanford against Henry M. and Joel P. Weeks, to quiet title to a quarter-section of land in Wabaunsee County. Sanford claimed an equitable title to the land, and actual possession thereof, under a written contract from Miss S. E. Bartholomew, dated December 8, 1879, which was filed for record February 11, 1880; but this contract was not acknowledged. On September 27, 1880, Miss S. E. Bartholomew conveyed

the land by warranty deed to the Weekses, which deed, duly acknowledged, was filed for record October 1, 1880. Within a day or two after receiving this deed, the Weekses took actual possession of the land; proceeded to build a dwelling-house, and make other improvements; soon after, they moved into the house with their families, and have had actual possession ever since.

It appears from the evidence and findings of the trial court that Sanford never paid or offered to pay for the land according to the terms of his written contract. The court held, as a matter of law, that by his failure to comply with the terms of the contract, his rights in the land became forfeited, and that he had no equities or other interests therein at the commencement of this action. In the contract, time is not stated as of the essence, and courts are reluctant to enforce forfeitures. It is not to be presumed that the parties to the contract intended that time should be of the essence thereof, in the absence of any stipulation to that effect. When there is simply a contract to convey upon the payment of a certain amount at a specified time, time is not of the essence of the contract, and a conveyance of the title may be decreed upon tender of the price and interest, if made within a reasonable time: *Mo. River etc. R. R. Co. v. Brickley*, 21 Kan. 275; *Land Co. v. Perry*, 23 Id. 140.

If the decision of the trial court rested upon its construction of the written contract of December 8, 1879, the judgment would necessarily have to be reversed; but this is not the pivotal point in the case. The trial court specially found upon the evidence that the Weekses had no notice, actual or constructive, on September 27, 1880, that Sanford had or claimed to have any interest whatever in the land. If the Weekses purchased without notice of Sanford's equities in the land, then of course the Weekses are entitled to the judgment rendered in their favor, because they were *bona fide* purchasers for value. As the written contract of December 8, 1879, was not acknowledged, it being filed for record did not impart notice to the Weekses, or any one else: Comp. Laws 1885, c. 22, secs. 9, 19, 20.

Sanford never made any improvements on the land after the date of his contract; but it appears from the evidence that prior to the contract, under consent from Miss Bartholomew, he had taken possession of the land, or a part of it, and had made some improvements, consisting of the breaking of

thirteen or fourteen acres, which were fenced with barbed wire and oak posts. There was quarried and corded up upon the land at the time considerable rock. There were also some preparations toward the construction of a lime-kiln. Sanford, however, had no house upon the land, and was not living thereon. According to the evidence of the Weekses, they had no notice nor knowledge at the time of their purchase that the improvements thereon had been made by Sanford, or that he had any interest or claim to the same. They made inquiries of the agents of their grantor, Miss Bartholomew, and were informed by them that she was the owner of the premises, and that the matter was all straight. They also inquired of a responsible banker if they could rely upon the representations of these agents, and they were informed they could.

We have time and again stated that open, notorious, unequivocal, and exclusive possession of real estate under an apparent claim of ownership is notice to the world of whatever claim the possessor asserts, whether the claim be legal or equitable in its nature: *McNeil v. Jordan*, 28 Kas. 7; *Tucker v. Vandermark*, 21 Id. 263.

If this were an action pending between Sanford and Miss S. E. Bartholomew, we would have no hesitation in holding that Sanford had actual possession of the premises; but this action is between Sanford and the Weekses, who claim to be innocent purchasers. The only question, really, for our determination is, whether there is sufficient evidence in the record to sustain the finding of the trial court that the Weekses had neither actual nor constructive notice before their purchase of the land that Sanford had or claimed any interest therein. It was the province of the trial court to determine the credibility of all the witnesses. It seems to have wholly disregarded the evidence of Sanford. If there was injustice in this, we are unable to correct it. The evidence of Henry M. Weeks and Sanford directly conflicts. There was evidence that Sanford did not have open, notorious, unequivocal, and exclusive possession of the land at the time of the purchase of the Weekses; therefore we cannot disturb the finding of the trial court, as there is evidence to sustain it. This conclusion necessarily causes an affirmation of the judgment.

Several errors are alleged concerning the admission and rejection of testimony. The briefs do not refer specifically to the pages of the record which counsel desire to have examined, and this of itself is a sufficient excuse for not commenting

upon these alleged errors. Notwithstanding the failure of counsel to comply with the rules of practice promulgated by this court, we have read the record carefully, and find, in view of the conclusions we have reached, that the alleged errors are wholly immaterial.

As the evidence sustains the findings of the trial court, notwithstanding one of the reasons given for the judgment is erroneous, the other reasons are sufficient, and the judgment must be affirmed.

TIME IS OF ESSENCE OF CONTRACT FOR SALE OF LAND, WHEN: See *Thorn-ton v. Sheffield etc. R. R. Co.*, ante, p. 337.

ADVERSE POSSESSION IS TAKEN STRICTLY, AND EVERY PRESUMPTION IS IN FAVOR OF POSSESSION IN SUBORDINATION TO THE RIGHTFUL OWNER: See *Schwallback v. Chicago etc. R'y Co.*, 2 Am. St. Rep. 740, and note. In *Scott v. Mills*, 49 Ark. 266, it was held that one who entered under color of title, and after deadening a few trees, left the land and exercised no other act of ownership over it except to pay taxes, had not acquired a title by adverse possession.

RANKINE v. GREER.

[38 KANSAS, 343.]

REPLEVIN BY MORTGAGEE. — LEVY OF EXECUTION ON PROPERTY SUBJECT TO CHATEL MORTGAGE gives officer no greater rights therein than mortgagor himself had; and the mortgagee, upon default of payment of the debt, is entitled to possession of the property, and upon demand for such possession on the officer, may bring his action to recover the same.

REPLEVIN. — IT IS NO DEFENSE IN ACTION BY MORTGAGEE AGAINST OFFICER, to recover mortgaged property held under levy of execution, to show that, at the time demand was made on the officer for possession, there was a prior outstanding mortgage held by another person against the same property.

ACTION to recover possession of two mares brought by the mortgagee after due demand upon the officer, one E. J. Cady, who was in possession of the property. At the time of taking the mortgage there were two other mortgages upon said property, which fact was then fully known to the plaintiff's agent. One of these mortgages was in favor of one Ament. The defendant Greer was administrator on the estate of E. J. Cady. From judgment for defendant the plaintiff brought the case here for review. The other facts sufficiently appear in the opinion.

Vance and Campbell, for the plaintiff in error.

J. P. Greer and Thomas Archer, for the defendant in error.

CLOGSTON, C. The question presented for our consideration is, Are the conclusions of law and judgment sustained by the findings of fact as found by the court? If they are, then the judgment was properly rendered thereon for the defendant. At the time this action was commenced, Cady, the constable, was in possession of the property by virtue of an execution regularly issued upon a judgment in favor of Mrs. Greer. This execution was properly levied upon the property in controversy, and by such levy all right of Brinzendine, the owner, was transferred to the judgment creditor; but this levy gave the constable no greater right to the possession of the property than Brinzendine had, and when demand was made upon the constable for the property, it was his duty to surrender it to the mortgagee, the plaintiff in this action. This surrender would have passed the property to the plaintiff with this additional burden or lien of the execution creditor, which would have the effect to transfer whatever right Brinzendine had in the proceeds after the sale of the property under the mortgage, and the satisfaction of the debt secured thereby to the execution creditor, or to the constable who held the execution. Releasing the property to the plaintiff would not release the lien established by the levy only so far as the possession of the property was concerned; but the lien would continue and bind the surplus proceeds to the amount of the judgment and costs. By the terms of the mortgage, plaintiff was entitled to the possession of the property upon default in the payment of the debt for which the mortgage was given, and all that it was necessary for the plaintiff to do before bringing the action was to demand the possession of the property under his mortgage. The mortgage having been given to secure a debt, and the debt having become due, no demand was necessary upon Brinzendine for its payment, and consequently no demand was necessary upon the constable except for the possession of the property.

Defendant also insists that, as it was shown that Ament had a first mortgage upon the property, which was also due, and gave him a prior right to its possession, for this reason plaintiff was not, at the commencement of the action, entitled to its possession. It is true that, under a general denial in an action of replevin, the defendant may show that the plaintiff is not entitled to the possession of the property, that being the gist of the action; and to defeat plaintiff's right of possession, he may not only show that he is entitled to the possession him-

self, but may also show that the right of possession belongs to another, even if a stranger to the action; but this right of possession must be an absolute right,—one not contingent or depending upon circumstances or conditions,—and it would not be sufficient to show that there were other and superior outstanding mortgages against the property, although, under some circumstances or conditions, the mortgagee might be entitled to the possession of the property, even as against both plaintiff and defendant. This right of possession under a mortgage is a right to be claimed by the mortgagee. He might never claim the property; it might not be necessary for him to do so; the debt might be paid, or he might have other security or other property included in his mortgage sufficient to satisfy his claim independent of this property. This being true, we think that the fact that Ament held a mortgage on this same property is not sufficient to defeat the plaintiff's right to recover its possession as against the defendant's claim under the levy of the execution. He was entitled to the property as against the defendant, and as against all the world, until some other claimant asserted a better right.

Again, defendant insists that the plaintiff's debt had nearly all been paid after the commencement of the action and before trial; and the court so found. The evidence upon which this finding was made was improperly received. The issue joined and the facts to be tried were, whether or not the plaintiff was entitled to the possession of the property at the commencement of the action; and if, after that, payment or anything else had occurred that would render plaintiff's claim inoperative, it must be set up as a defense, and on application to the court showing such facts, leave to file a supplemental defense would have been given, and an issue would then have been presented. This was not done. The evidence was incompetent, and a finding or conclusion upon evidence improperly received on an issue not raised by the pleadings will be disregarded by this court. We are therefore of the opinion that at the commencement of this action plaintiff was entitled to the immediate possession of this property as against the defendant.

It is recommended that the cause be reversed, and remanded to the court below, with an order that judgment be rendered on the findings of fact as found by the court, in favor of the plaintiff below, for the possession of the property, and for costs.

By the COURT. It is so ordered.

MORTGAGEE'S RIGHT OF ACTION FOR UNLAWFUL INTERFERENCE WITH CHATTELS MORTGAGED exists as well when the property is taken under legal process as when taken without color of authority: *Tannahill v. Tuttle*, 61 Am. Dec. 480, and note.

TOPEKA CITY RAILWAY COMPANY v. HIGGS.

[88 KANSAS, 375.]

NEGLIGENCE — WHEN STREET-RAILWAY COMPANY UNDERTAKES TO CARRY LARGE NUMBERS OF PEOPLE vastly in excess of the seating capacity of its cars, and permits passengers to ride on the platforms and foot-boards without objection, and collects fare from them, and stops its cars when in such crowded condition that no seats are attainable, and permits persons to get upon them and to be carried from place to place, and when the cars are in such crowded condition, with passengers riding on the foot-boards, runs them so near the intersection of a switch with the main track that they cannot pass without injury to the passengers, the company is guilty of gross negligence.

STREET-RAILWAY COMPANIES AS CARRIERS OF PASSENGERS ARE BOUND TO EXERCISE ALL POSSIBLE SKILL, FORESIGHT, AND CARE in running their cars, so that passengers may not be exposed to danger on account of the manner in which the cars are run, and such skill and care include the exercise of every reasonable precaution to prevent injuries to passengers, and implies that there shall be good tracks, safe cars, careful management, and judicious operation in every respect. All possible foresight means more than this; it means anticipation if not knowledge that the operation of street-cars will result in danger to passengers, and that there must be some action with reference to the future, a provident care to guard against such occurrences, a wise foresight and prudent provision that will avert the threatened evil, if human thought or action can do so.

DEGREE OF CARE TO BE EXERCISED BY CARRIERS OF PASSENGERS. — The rule requiring highest skill and care in carrying passengers applies to its full extent, not only to steam-cars, but to street-cars and other vehicles drawn by horses, the difference being in the means and instrumentalities used, to prevent accident by reason of the mode rather than to the degree in which the preventive means are to be employed. To each mode of conveyance must be applied the greatest degree of skill, care, and foresight of which they are susceptible.

ACTION for damages for injury alleged to have been caused by negligence of the defendant company. Upon trial to the jury, the following instruction, among others, was asked to be given, but was refused: "2. The court instructs the jury that it is the duty of the defendant to exercise all reasonable precaution and care for the safety of its passengers; but it is also the duty of each and every person while riding on a street-car to use ordinary care for his own safety, and reasonable precaution to guard against accidents. And if the jury believe that at the time the plaintiff got aboard of defendant's car, on the

afternoon of October 1, 1885, he was lame and weak, so that he was not able by reason of said bodily infirmities to use ordinary strength and care to protect himself from accident, and the position on the step of the car was thereby more hazardous to plaintiff, then the act of plaintiff in taking the exposed position on the step of the car was negligence, and he cannot recover in this case." Among other questions of fact submitted to the jury was the following: "4. Was not plaintiff requested by the superintendent of defendant not to get on to the crowded cars in his crippled condition, but to wait, and he [the superintendent] would get him a seat?" which was answered in the affirmative. The other necessary facts appear in the opinion. Judgment was rendered against the defendant company, and it brought the case to this court.

Jones and Mason, and J. G. Waters, for the plaintiff in error.

William R. Hazen, and Hazen and Isenhardt, for the defendant in error.

SIMPSON, C. The defendant in error was a passenger on one of the open cars of the street-railway company on the evening of October 1, 1885, at a time when there was a vast concourse of people in the city of Topeka, drawn together by a sham battle on the fair-grounds during a soldiers' reunion. The car upon which the defendant in error was riding was going north from the fair-grounds, along a street known as Topeka Avenue. On this street, and between Huntoon and Thirteenth streets, is located, alongside of the main track of the street-railway, and to the east of it, a switch track, 217 feet long from point to point, used to allow cars to pass. The car upon which defendant in error was riding was what is called an open car; on each side of the frame of the car, extending its whole length, there was a foot-board from eight to ten inches wide, to enable passengers to step into and out of the car. And on occasions when there was a large and unusual number of passengers to be carried, these foot-boards were utilized by the company, and passengers were allowed to stand upon them, and to be carried on them from station to station. Higgs was standing on the west foot-board, north of the center of the car, and near to its front end, when the car turned onto the switch, went so far north on it, and approached so near to its intersection with the main track that a closed car coming south on the main track ran so near the open one on which he was riding, that

he was squeezed against one of the posts that support the roof of the open car, and was bruised and injured in the shoulders and back. The jury found, in answer to special questions submitted to them, that the open car upon which he was riding at the time the injury occurred was in motion; and there is no question under the evidence but that the closed car going south on the main track was also slowly moving. It does seem that, considering the vast crowds of people which were being transported by the street-railway company, the large number that was on this particular car,—every seat being occupied, the front and rear platforms crowded, and many persons standing on both foot-boards,—it was gross negligence upon the part of the employees of the railway company to approach so near the intersection of the switch to the main track. This act of the employees of the company was the direct and immediate cause of the injury inflicted on the defendant in error. It is among the special findings of the jury, in substance, that the car was so crowded at the time Higgs got upon it that there was no seat which could be occupied by him, and that his only chance was to ride upon the foot-board. It is in evidence that when large numbers of people were to be carried, the railway company permitted passengers to ride on the foot-boards, and collected fare from them; that on this occasion, people vastly in excess of the number of seats contained in such cars were carried, so that there was no contributory negligence on the part of the defendant in error in getting on the foot-board of the car to ride to town, and in standing there, being unable to secure a seat on account of the crowded condition of the car, there not being a vacant seat that he could have taken. It is sought to establish contributory negligence on the part of the defendant in error by proof that before this time he was crippled, and on this day was using a crutch and cane; that the superintendent of the street-railway company, to whom he was personally known, had noticed that he was using the crutch and cane, and had warned him not to attempt to get on the cars “while there was such a rush,” and promised to get him a seat in the cars; that Higgs waited for more than one hour after that promise, during which time the superintendent states that probably twenty-five cars had started, but he had done nothing to secure Higgs a seat. At the expiration of this time, Higgs went north the length of a block, and he and a lady relative whom he was escorting on that day got on the car upon which he was in-

jured, and rode down to the starting-place, hoping by that means to get a seat, but there was only one vacant seat, and that was given to the lady. As the car approached the usual stopping-place, the crowd congregated there, awaiting an opportunity to get down town, surged on the car as those who had ridden from town were getting off, and occupied the seats as fast as they were vacated. The special finding is, that there was not a seat which he could have taken. Then, according to the usages and practices of the company on such occasions, he had the right to get upon the foot-board of the car and ride thereon, and in this case it was not an act of negligence on his part. He was not injured in the act of getting on the car, as the superintendent seemed to be in fear of; this act he had performed safely, but he was injured by the negligence of the employees of the company, who permitted the open car to be placed so near the point of intersection of the switch with the main track that the cars could not pass each other with safety to the passengers. We cannot see that his use of a cane, and his temporary use of the crutch on that day, relieve the company from the liability caused by this act of gross negligence on its part. It appears from the evidence that the driver of the car was temporarily employed for the time of the reunion, and was probably inexperienced by want of former employment in this line of work, although the company kept him in its employment after the accident, and up to the time of the trial of the cause.

It is said that he could have seen the car coming on the main track, and avoided the injury by the exercise of ordinary caution. This is a dangerous assumption for the plaintiff in error; it is virtually saying that the use of his eyes ought to have made it apparent that the company was about to commit an act of gross negligence; but as he says he did not see the car until a moment before the injury occurred, we would much rather assume, for the sake of the employees on both cars, that the risk was not so imminent as to be seen and apprehended by the passengers. As a matter of fact, he did not see the danger until it was too late to avoid it. He was not guilty of contributory negligence in respect to any of the acts and matters alleged.

It must be held that when a street-railway company undertakes to carry large numbers of people, vastly in excess of the seating capacity of its cars, and permits passengers to ride on the platforms and foot-boards, without objection, and collects

fare from them, and stops its cars when in such a crowded condition that no seats are attainable, and permits persons to get upon them to be carried from place to place, and when the cars are in such a crowded condition, with passengers riding on the foot-boards, runs them so near the intersection of a switch with the main track that they cannot pass without injury to passengers, the company is guilty of gross negligence.

There is a very vigorous criticism of some instructions given, and of the refusal to give others, as requested by the plaintiff in error; but the important question to be solved is presented by the third instruction given, to wit: "Carriers of passengers are bound to exercise all possible skill, foresight, and care in the running of their cars, so that passengers may not be exposed to danger on account of the manner in which the cars are run." It is said that this places the degree of care required of a street-railway company too high, and hence it was error. Admitting that this instruction does hold the street-railway company to a too strict rule of diligence, and yet, as we view the evidence on the whole record, we would still hesitate to reverse the case. We doubt whether it would have been error in the trial court to have instructed the jury, as a matter of law, that the plaintiff was guilty of gross negligence in running its cars, for several reasons: first, the question of negligence in this case is to be determined very largely by the character of the act, and not by the character for care and caution which the street-railway company may sustain, or by the care and caution it was trying to exercise generally on this particular occasion. The negligence complained of here was the commission of such an act, to wit, the placing of the car on the switch so near the point of intersection with the main track that the most ordinary mind could see that injury would follow to those standing on the foot-boards. It seems that the evidence offered by the street-railway company aggravates, rather than excuses, the negligence. It is, in substance, that there was another car going north, and following the one the injury occurred on, and that it was necessary to drive the first so far north on the switch as to allow the one that was following room on the switch to pass the south-bound car on the main track. This is a demonstration that the switch was not properly constructed, that it was too short, or that it was intended for only one car, and ought not to have been used by both cars going north. In either case, it shows

negligence on the part of the company. The superintendent of the company testified that the length of the switch was 217 feet from point to point; that from the north point of the switch, running south, the radius of increase of the width between the switch and main track for the first forty feet is one inch to the foot; for the next twenty or thirty feet there is not so much increase, as it then approaches a straight line parallel with the main track; that the cars could pass each other and not touch when the front end of the car on the switch was twenty-six feet from the point where the switch left the main track. It is from seventy to seventy-two feet from the points of intersection where the switch commences to curve in for the purpose of running on the main track. This leaves a length of switch with an equal distance from the main track of forty-eight feet, the distance from the main track being not quite two feet. A person riding on the foot-board would be perfectly safe at any point on the switch until after it curves toward the main track. The skill, care, and precaution of drivers, conductors, and the superintendent generally amount to nothing, in view of the plain fact that this car was driven too far north on the switch. It was this act, in this particular case, that was the direct and immediate cause of the injury.

The defendant in error had a right to presume due care on the part of the railway company. He was riding on the car in a position allowed to be occupied by other passengers on like occasions; he had no control over the employees of the company, and no knowledge of the switch, or that the company was using it beyond its safe and reasonable capacity, but he had the undoubted right to rely on the exercise of ordinary prudence by the street-railway company, both as to the use of the switch and the management of its cars in the act of passing each other, when one or both were crowded with passengers. The fact that the cars, both in motion, came so near each other in the act of passing that the injured man was pressed by them, squeezed in between them, is not in dispute. Hence we say that if the court below had charged the jury, as a matter of law, that this was gross negligence on the part of the street-railway company, we would hesitate to say that it was error; but as that was not done, we will consider the instruction, and determine whether or not it stated the rule of diligence. Cars drawn by horses upon rails are in the main governed by the same rules as other vehicles: *Shearman and Redfield on Negligence*, 3d ed., 312. In an action to recover

damages for personal damages sustained as a passenger in a stage-coach, the court has approved an instruction which stated that "a stage-coach proprietor who carries passengers for hire is responsible for all accidents and injuries happening to passengers which might have been prevented by human care and foresight": *Sawyer v. Sauer*, 10 Kan. 466. So that the only objection to the instruction given in this case results from the use of the word "possible," and it means "liable to happen or come to pass"; "capable of existing, or of being conceived or thought of"; "capable of being done"; "not contrary to the nature of things": Webster's Dictionary. "All possible skill and care" implies that every reasonable precaution in the management and operation of street-cars be used to prevent injuries to passengers; it means good tracks, safe cars, experienced drivers, careful management, and judicious operation in every respect. All possible foresight means more than this; it means anticipation, if not knowledge, that the operation of street-cars will result in danger to passengers, and that there must be some action with reference to the future, a provident care to guard against such occurrences, a wise forethought and prudent provision that will avert the threatened evil, if human thought or action can do so. Is it possible that the thought never occurred to any one of the persons operating this street-railway that a car on the main track and one on the switch could run so close together that they would collide, or that some one might be injured by their proximity? The instruction as applied to the particular facts of this case is not objectionable; its phraseology may not be felicitous, but it does not practically require any greater or higher degree of care than if the expression used had been "the highest" or "the utmost," and these are frequently found in the reported cases.

The case of *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695, cited by plaintiff in error, is a case of injury by a stage-coach, and the court says: "Common carriers of persons are required to do all that human care, vigilance, and foresight reasonably can under the circumstances, in view of the character and mode of conveyance adopted, to prevent accident to passengers." All that human care can do is the "highest," "utmost," "possible" effort.

The case of *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 226, 3 Am. Rep. 581, is one in which a passenger in a sleeping-car was injured by the axle of the forward truck of the car breaking, by reason of a latent defect in its construction, not discern-

ible by those who were skilled in such matters, and has no application here, the facts being entirely different; and yet the court says in that case: "The carrier may relieve himself by showing that the injury arose from an accident which the utmost skill, foresight, and diligence could not prevent."

The supreme court of the United States, in its opinion in the case of *P. & R. R. Co. v. Derby*, 14 How. 468, says: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and public safety require that they be held to the greatest possible care and diligence."

In that case it was the greatest possible care and diligence in the management of steam-cars; in this case it is all possible skill, foresight, and care in the use of horse-cars. Both of these expressions are used with reference to the character and modes of conveyance adopted in either case. They are similar in meaning and in legal effect, and yet are not to be understood to require that the same preventive measures or wise precautions which are taken by those directing the operation of steam-cars must be taken by those in charge of horse-cars; but they do mean that the best effort of the minds directing the operation and supervising the management of steam-cars and of horse-cars shall be diligently applied in devising ways and means to prevent injuries to passengers being carried thereon. Steam-cars may require greater care in their management and greater caution in their operation, but the passengers are entitled to the highest possible degree of each; so those riding on street-cars have the legal right to insist that they shall be managed and operated with all possible skill, care, and foresight which in their nature they are capable of.

The theory of counsel for the plaintiff in error seems to be that the rule of highest skill can only be applied to cars propelled by steam, because it is the most dangerous of all modes of conveyance. We think that the rule applies to street-cars and other vehicles drawn by horses, to its full extent, the difference being in the means and instrumentalities used to prevent accident by reason of the mode, rather than to the degree, in which the preventive means are to be employed. To each must be applied the greatest degree of skill, care, and foresight of which they are susceptible to avoid liability for injuries occasioned in their operation. We think there is no error in the instructions given, and no error in refusing the instructions asked for.

Objection is made to instructions four and six, wherein the court instructs the jury that the mere fact that the plaintiff Higgs was riding on the step of the car would not defeat his right to recover, if it was customary to ride there, and the car was so crowded he could not procure a seat, and if he rode there without objection from the conductor or other employee of the company; and it is said they were clearly wrong because there was no evidence of any permission to ride on the step, and because the evidence was undisputed that the plaintiff Higgs had been distinctly warned against riding there; and the case of *Huelsekamp v. Citizens' R'y Co.*, 34 Mo. 45, is cited and claimed to be decisive of this question. What are the facts as developed by the witnesses produced by the plaintiff in error? The superintendent said: "I said to Higgs, don't try to get on the cars while there is such a rush; as soon as I can, I will get you a seat"; but he never did anything more than talk to him; made no effort to furnish a seat. It is not in terms a warning not to ride on the foot-board; it is an expression of fear that, as he was crippled, he might get hurt in the rush, coupled with a promise to get him a seat. He did not get hurt in the "rush," and he did not get a seat. The superintendent also stated that at the reunion it was customary for persons to ride on the foot-boards, on the platform of the cars, and even on the top of the cars, and that the conductors collected fare from them wherever they rode, but they were requested not to so ride by him; that on all cars that started after he had promised Higgs to get him a seat, persons were riding on the foot-boards; that upon all the cars coming to and going from the city the company allowed men, women, and children to continuously ride upon the front platform, the rear platform, and also upon the foot-boards of the cars, and collected fare from them; that fare was collected from men riding on the top of the cars the same as if they had ridden on the inside of the cars; that the seating capacity of an open car is twenty-five persons, and it carried from that number to eighty persons; that it stopped to receive passengers and allowed them to get on long after the seats were all occupied; that fare was collected if they got on the car, without reference to whether they had a seat or not. The conductor of the car said that it was a fact that passengers continuously rode on the foot-boards, and sometimes on the top of the cars, and he collected fare from them. These citations from the evidence in the record abundantly establish the proposition

that on this occasion the defendant in error had permission to ride on the foot-boards, and had not been distinctly warned against riding there. These facts justify the instructions complained of. The case cited was reversed, because no such permission was proved or shown on the trial below; here it was shown conclusively by the witnesses of the plaintiff in error that the usage and practice, whenever there was a large crowd to be accommodated, was for men, women, and children to continuously ride on the foot-boards, and that fare was always collected from them.

The second instruction asked by the street-railway company was properly refused, because it did not state the rule of diligence and care required by such company in the operation of its road and the management of its cars.

The answer to special question No. 4, submitted to the jury, must be construed in the light of the evidence respecting the subject-matter of the interrogatory. In the view of counsel for plaintiff in error, a person in a crippled condition has no right to ride on a street-car under any circumstances, except when a seat is furnished by some employee of the company. It is unquestioned that the company can make all such rules respecting the manner in getting off or on the cars; the place where passengers are to ride; and every other reasonable regulation that conduces to the safety and accommodation of the persons to be carried over its line, and has the undoubted right to insist on their due observance; but having done so, the company must not be the first to violate them or depart from their requirements; so that if it is permitting men, women, and children, on public occasions, when there is a large number of persons to be carried, to ride on the foot-boards of its cars, it cannot relieve itself of liability for an injury to a person on the foot-board by a warning and a promise of a seat. The defendant in error had the same right to ride on the foot-board of the car as any other passenger whom they carried on that day. If, on account of his crippled condition, he had been injured by people rushing to get on or off the cars of the company, of course no liability would attach to the company on account of such an injury. His crippled condition did not change his rights, or vary the duties and obligations of the company as a carrier of passengers, in any respect, except that he was entitled to a longer time in which to get on or off the cars than a passenger who was not crippled or infirm. He was not injured by reason of his crippled condition, nor is there

any evidence which shows that such condition, either directly or indirectly, contributed in any manner to the injury.

It is also insisted, in this connection, that the position taken knowingly and intentionally by the defendant in error is negligence *per se*, and for that reason the company is not liable. While we have substantially disposed of this objection in what we have said on another branch of the case, it is well to reinforce that view by citations from a few well-considered cases. In *Germantown R'y Co. v. Walling*, 97 Pa. St. 55, 39 Am. Rep. 796, "the passenger voluntarily got upon a car so crowded that he was obliged to take a position on the step of the front platform of the car, occupied at the time by two other men, between whom he squeezed into a position, where, for the purpose of retaining his place, he was obliged to hold fast with one hand to the dasher, and with the other to the iron-bar under the window of the car. The car stopped when he hailed it, and received him as a passenger. The driver testifies that he knew the car was so full a man could not go through it to the rear platform. Crowded as it was, the conductor said there was room for more, both inside and on the rear platform, but Walling first tried to get on the rear platform, and failing, went to the front. Conductor, driver, and passengers acted as if there was room so long as a man could find rest for his feet, and a place to hold on with his hands. The companies do not consider such practices dangerous, for they knowingly suffer it, and are parties to it. Their cars stop for passengers when none but experienced conductors see a footing inside or out. Street-railway companies have all along considered their platforms a place of safety, and so have the public. Shall the court say that riding on a platform is so dangerous that one who pays for standing there can recover nothing for an injury arising from the company's default? So little danger exists in riding on platforms, accidents to passengers while thus riding are so rare, that this is the first time the question raised has been presented in Pennsylvania."

In *Meesel v. L. & B. R. R. Co.*, 8 Allen, 234, the court said: "The seats inside are not the only places where the managers expect passengers to remain, but it is notorious that they stop habitually to receive passengers to stand inside till the car is full, and continue to stop and receive them even after there is no place to stand except on the steps of the platforms. Neither the officers of these corporations, nor the managers of the cars, nor the traveling public, seem to regard this practice

as hazardous, nor does experience thus far seem to require that it should be restrained on account of the danger. There is therefore no basis upon which the court can decide, upon the evidence reported, that the plaintiff did not use ordinary care."

The facts in this case were very similar to the one cited from Pennsylvania. Standing on the front platform of a horse-car when there is room inside is not conclusive evidence that the person injured by the driver's default was not exercising due care: *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239.

A street-railway company has the right to carry passengers on the platforms, and if a passenger be injured while standing there, without objection by the company's agent, whether the injury was with his contributory negligence is for the jury to decide, under all the facts and circumstances detailed in the evidence: *Burns v. Bellefontaine R'y Co.*, 50 Mo. 139. It has also been decided in other states that if a passenger be injured while standing on the platform of a street or horse car, the question of his contributory negligence is one of fact for the jury.

In *Nolan v. Brooklyn, C., & N. R. R. Co.*, a very recent case decided by the New York court of appeals, 87 N. Y. 63, 41 Am. Rep. 345, "the plaintiff, a passenger on a street-car, rode on the front platform, without warning or notice to the contrary, for the purpose of smoking. There was plenty of room inside, but the conductor took his fare without comment." Being thrown off and injured by a violent and negligent jolt, it was held that he was not debarred from recovery by occupying the platform. It seems from these cases that there could be no pretense for saying, under the particular facts of this case, that the defendant in error was negligent *per se*.

There is nothing in the other exceptions which would justify a reversal.

It is recommended that the judgment be affirmed.

By the COURT. It is so ordered.

COMMON CARRIER IS BOUND TO USE ALL POSSIBLE FORESIGHT AND CARE to prevent injury to passenger: See *Chicago etc. R. R. Co. v. Pillsbury*, ante, p. 483, and note.

COMMON CARRIER PERMITTING PASSENGER TO RIDE IN DANGEROUS POSITION, without warning him of danger, is liable for any consequent injury to the passenger. See *Lake Shore etc. R. R. Co. v. Brown*, ante, p. 510, and note.

In *Germantown Pass. Ry Co. v. Walling*, 37 Am. Rep. 711, 39 Id. 796, it was held that where a passenger gets upon the steps of the platform of a crowded street-car, and stands there during the trip, without objection from the persons in charge of the car, he is not conclusively negligent so as to bar recovery for a consequent injury.

SOUTHERN KANSAS RAILWAY COMPANY v. RICE.

[88 KANSAS, 898.]

RULE OF DAMAGES FOR WRONGFUL EXPULSION FROM RAILROAD TRAIN is, that passenger may recover for his time, inconvenience, the necessary expenses to which he is subjected, and if treated with violence or in an insulting manner, for the injuries to his person and feelings. If the expulsion be malicious, or through negligence which is gross and wanton, then exemplary damages may be awarded.

George R. Peck, A. A. Hurd, and Robert Dunlap, for the plaintiff in error.

John T. Little and Samuel T. Seaton, for the defendant in error.

HORTON, C. J. On October 29, 1885, Benjamin Rice, a colored man, purchased of the ticket agent of the Southern Kansas Railway Company, at Olathe, in this state, for fifty cents, a limited railroad ticket to Kansas City, Missouri, and return, good for three days, the date of issue being stamped on the back. On that day he was carried as a passenger by the railway company, upon one of its passenger trains, from Olathe to Kansas City. The "going coupon" of the ticket was torn off and taken up by the conductor of the train. On the next day, October 30th, Rice, desiring to return to Olathe, boarded one of the passenger trains of the company, which left Kansas City about ten o'clock, P. M., and when the conductor called upon him for his fare, presented the "return coupon" of the ticket, which he had purchased the day before. The conductor took it to the light, and after examining it, handed it back to Rice, saying it was not good, and informed him that he could not honor it. Rice insisted that the ticket was good, and said to the conductor that he had purchased the ticket the day before, and that he, the conductor, had carried him upon the ticket to Kansas City on that day. Another passenger also stated to the conductor at the time that he had seen Rice purchase the ticket on the 29th. The conductor replied that he could not honor the ticket, and subsequently

took hold of Rice's coat-collar, and led him out of the car. Rice had no money to pay any extra fare; and when he was off the car, or about to get off, a friend gave him seventy-five cents, which he gave to the conductor, who returned him five cents, punched a receipt for his fare, and permitted him to ride to Olathe.

On the part of Rice, it is contended that the ticket he presented showed plainly on its back that it was stamped at Olathe on the 29th of October; that he told the conductor that he did not have any money to pay any more fare; that he was quietly in his seat as a passenger when ordered by the conductor to leave the train; that he did not make any forcible resistance to the orders of the conductor, but that the conductor took him out of the car, and off upon the steps of the platform.

On the part of the railway company it is claimed that the ticket had been folded up and creased at the date; that the conductor took it to the light and examined it carefully; that the date was obliterated; that the ticket looked so old and worn that the conductor believed it had expired; that he informed Rice that the ticket was not good, and that he could not ride upon it, but would have to pay fare; that when the train reached Holliday, the conductor inquired of Rice what he was going to do; that Rice then refused to pay fare or get off the train; that the conductor then took hold of Rice's coat-collar and led him to the platform of the station, or to the last step of the car; that then a friend told Rice to come back and he would give him money to pay his fare, and the conductor permitted Rice to take his seat and ride to his destination; that when Rice was informed that he would have to pay his fare or leave the car, it was his duty to do one or the other; that he should have paid his fare and relied upon his remedy to recover it back; that if he could not do this he should have quietly left the train, and not provoked or made necessary an assault; that therefore he should have recovered only seventy-one cents, that amount being the sum assessed by the jury for his pecuniary loss. The railroad company asked instructions which tended to limit the amount of damages that Rice was entitled to recover to the exact fare paid by him, with interest thereon. The court refused to give these instructions, but directed the jury, among other things, as follows: "I instruct you that if you find the plaintiff presented to the conductor for his passage a limited ticket, good only for three days from

the date of its sale, and that the conductor, from the mutilated and worn condition of the ticket, was unable to read the date on the ticket, and honestly believed that the ticket was an old one, and not good, and for this reason, and without any unnecessary force or indignity to the plaintiff, required him to pay his fare or get off, and did, upon refusal and failure to pay fare, remove said plaintiff, without any unnecessary force and without injury to his person, to the platform of the car, or to the platform or ground at a regular station, and then plaintiff paid his fare and continued his journey on the same train and without delay, — then, if you find as a fact that the ticket presented by plaintiff was a good and valid ticket, and that the conductor had no right to collect this fare from the plaintiff, you must find a verdict for the plaintiff, and the measure of his damages would be the amount of fare paid by him, with interest at seven per cent per annum from October 30, 1885, and actual compensation for the injury and outrage, if any, suffered by plaintiff from the alleged assault.”

We perceive no error in this instruction. In actions for the recovery of damages for the wrongful expulsion of a passenger from a train, the passenger may recover for his time, inconvenience, the necessary expenses to which he is subjected; and if treated with violence, or in an insulting manner, for the injuries to his person and feelings. If the expulsion be malicious, or through negligence which is gross and wanton, then exemplary damages may be awarded.

“There is a special duty on the carrier to protect its passengers, not only against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and insults of its own servants, and that for a breach of that duty he ought to be compelled to make the amplest reparation. The law wisely and justly holds him to a strict and rigorous accountability. We would not relax in the slightest degree this strict accountability. We know that upon it in no small degree depends the safety and comfort of passengers”: *M. K. & T. R’y Co. v. Weaver*, 16 Kan. 456; *Kansas Pacific R’y Co. v. Kessler*, 18 Id. 523.

We fully concede that no one has a right to resort to force to compel the performance of a contract made with him by another; and a passenger about to be wrongfully expelled from a railroad train need not require force to be exerted to secure his rights, or increase his damages. For any breach of contract or gross negligence on the part of the conductor or

other employees of a railroad company, redress must be sought in the courts, rather than by the strong arm of the person who thinks himself about to be deprived of his rights. A passenger should not be permitted to invite a wrong and then complain of it: *Hall v. Memphis & C. R. R. Co.*, 15 Fed. Rep. 57; *Townsend v. N. Y. C. R. R. Co.*, 56 N. Y. 301; *Bradshaw v. South B. R. R. Co.*, 135 Mass. 409; *Pennsylvania R. R. Co. v. Connell*, 112 Ill. 296; 54 Am. Rep. 238; *Palace Car Co. v. Reed*, 75 Ill. 125; 3 Wood's Railway Law, sec. 364.

Of course a party upon a train may resist when, under the circumstances, resistance is necessary for the protection of his life, or to prevent probable serious injury; nor can a party be lawfully ejected from a train while in motion so that his being put off would subject him to great peril. In this case, Rice made no unreasonable resistance. He did not resort to force or violence; having a good ticket and being entitled to ride, he refused to pay fare or get off the train. The conductor had no difficulty in leading him off, and about all that Rice did was merely to assert his lawful right to ride upon the train. Where a passenger with a clear right and a clean ticket is entitled to ride on that trip and train, and is wrongfully ejected without forcible resistance upon his part, the jury are and ought to be allowed great latitude in assessing damages. They should award liberal damages in full compensation for the injuries received. The quiet and peaceable behavior of a passenger is to his advantage, rather than to his detriment.

Complaint is also made of other instructions of the court, regarding the measure of damages. Among other things, the court said to the jury that if "the assault was malicious and without cause or provocation, or was accompanied by acts of gross insult, outrage, or oppression, you may award the plaintiff exemplary or vindictive damages." Also, "that in estimating damages they might take into consideration the indignity, insult, and injury to plaintiff's feelings by being publicly expelled." Further, that if they found "there was on the part of the conductor either malice, gross negligence, or oppression, they would not be confined in fixing damages to the actual damages received, but were justified in giving exemplary damages." It is said that these instructions were misleading and erroneous, because there was no evidence whatever to show that the conductor acted with malice or gross negligence. Upon the evidence of Rice, corroborated by

McCulloch, another passenger, who said that he saw Rice purchase the ticket on October 29th, there was evidence before the jury upon which to found these instructions: *Hufford v. Grand Rapids etc. R. R. Co.*, Mich., February, 1887. The forcible expulsion of Rice from the car, where he was rightfully seated, was such a wrong as is inevitably accompanied with more or less outrage and insult. There was no excuse for the act of expulsion, except the honest mistake or the gross negligence of the conductor. If that mistake was due to such reckless indifference of the rights of a passenger on the part of the conductor as established gross negligence, amounting to wantonness, and the jury so found, they might find exemplary damages: *Kansas Pac. R'y Co. v. Kessler*, *supra*; *Leavenworth, Lawrence, & G. R. R. Co. v. Rice*, 10 Kan. 426.

Whether the conductor was grossly negligent, amounting to wantonness, or actuated by malice, were matters before the jury for their determination upon the evidence. Under the authority of *Titus v. Corkins*, 21 Kan. 722, Rice was entitled to recover the expenses incurred by him in the litigation, if entitled to exemplary damages: *Hall v. Memphis etc. R. R. Co.*, 15 Fed. Rep. 95-97.

The amount of the verdict in this case was only \$117.46; therefore the damages are not so excessive as to indicate passion or prejudice on the part of the jury.

The other matters submitted are immaterial. The judgment of the district court will be affirmed.

COMMON CARRIER, FOR WRONGFUL EXPULSION OF PASSENGER FROM CAR, is liable in damages for mortification, pain of mind and body, loss of time, and medical expenses: *International etc. R'y Co. v. Wilkes*, 2 Am. St. Rep. 515, and note.

PILCHER v. ATCHISON, TOPEKA, AND SANTA FE RAILROAD COMPANY.

[88 KANSAS, 516.]

HOMESTEAD. — CONSENT OF WIFE IS NECESSARY TO VALIDATE GRANT made by husband to a railroad of right of way over homestead occupied as such by the family. No interest, encumbrance, or lien, except those specifically mentioned in the organic law, can attach to or affect the homestead unless given by the joint consent of husband and wife.

HOMESTEAD — EVIDENCE OF WIFE'S CONSENT TO ALIENATION. — The fact of joint consent of husband and wife to an alienation of an easement in

the homestead is best evidenced by a writing to that effect; but where the constitution does not in express terms require that it shall be so shown, it may be established the same as any other material fact, provided that there is always some showing of joint consent, as required by the constitution.

Parker and Seaton, for the plaintiff in error.

George R. Peck, A. A. Hurd, and Robert Dunlap, for the defendant in error.

SIMPSON, C. The plaintiff in error has continuously resided upon the land which is the subject-matter of this controversy since the year 1868. Her husband, in whom the title vested, died in 1879, leaving by will the plaintiff in error at least a life estate in this land. She has claimed and does claim it as her homestead, and further claims that by force of her homestead rights, the defendant railway company never acquired any easement therein, and she brought her action in ejectment to recover that portion occupied and used by the railway company. Counsel for defendant in error contend that, as the plaintiff in error elected to take under the will, her homestead right is waived by that election; and they cite *Watson v. Christian*, 12 Bush, 524, in support of their view. They go still further, and deduce from that decision that, as she claims under the will, she ought not to be permitted to set up a claim of homestead under the statute, but she should be bound by everything her husband did, to the same extent that he would be bound, because she is privy in estate by virtue of the will. The Kentucky case may have been rightfully decided under the homestead provisions of that state; but this case cannot be accepted as an exposition of the law of this state. We make no criticism upon it; all we say is, that it is not to be taken as an interpretation of the operation of our constitutional provisions and statutory enactments upon the subject of the homestead. Thomas Pilcher had the legal title to the land in his lifetime, and it was occupied by him and his family as a residence. It was his homestead, and was unquestionably the homestead of his wife and children. When he died, and ceased to be the head of the family, his wife, this plaintiff in error, became the head of the family, and she was entitled to be so considered. The land continued to be a homestead after his death to the same extent that it was before, and so continues until after all the children arrive at the age of maturity, and until it shall have been partitioned

among the heirs. It cannot be made subject to the payment of the debts of the husband. The death of the husband does not affect the homestead rights of the wife or children in any respect. If the land descends to them, it is still a homestead. If the husband wills it to the wife, as in this case, during her life, the life estate supports the homestead right. Any estate that is vendible under an execution will support the homestead exemption. Valentine, J., in *Randal v. Elder*, 12 Kan. 261, says: "We do not think it necessary that all these lots or parcels of land should be held by an absolute fee-simple title, but we think it necessary they all be held by some kind of title or interest different from that which the whole public may have to the property."

Dillon, J., in *Bartholomew v. West*, 2 Dill. 293, says: "When the statute speaks of property owned by the debtor, it does not mean that the ownership must be of full legal title. It is sufficient that the interest may be such as may be sold on execution, or subject to the payment of debts."

In *Robinson v. Smithey*, 80 Ky. 636, the court said: "That Mrs. Robinson is entitled to a homestead, we think is clear. Her husband devised the entire tract of land to her for life, the remainder to his children, and she was in the actual possession and occupancy with her family. She is the owner and in possession of this tract of land, with a life estate vested in her by the provisions of the will. She can use, sell, or dispose of this interest as she pleases; and we see no reason why her right to a homestead is not embraced by the statute. She occupies it as a homestead, and owns it for life. She is asserting her right because she is the owner, and not by reason of having derived it from her husband. It is immaterial in what manner she derives title, if she is the owner, and occupies the estate as a homestead. In some of the states, the homestead exemption is held to apply to an estate for years: See *Patton v. Deberard*, 13 Iowa, 53; *Johnson v. Richardson*, 33 Miss. 462. In Illinois, the owner of a life estate is held entitled: *Deere v. Chapman*, 25 Ill. 610; 79 Am. Dec. 350."

Other courts have gone to as great length in holding that any vendible estate will support the homestead right. The plaintiff in error in this case holds by a devise, which gives her an estate for life, with power of sale, and any remainder goes to the children begotten of the marriage. She has such an estate in this land, without the will, or operation of the

statutes of descents and distributions, as will enable her to claim it as a homestead, because she has been in the actual possession of it, residing thereon ever since 1868. It must be held, for all the purposes of this case, that her homestead rights attached to the land when she first occupied it with her children, as the wife of Thomas Pilcher, the then owner, and that it was, at the time of the commencement of this action, still her homestead. The court below found that, in 1871 and 1872, the St. Louis, Lawrence, and Denver Railroad Company built a railroad across said land, under some kind of an agreement with Thomas Pilcher, the then owner thereof, and that, by due process of law, the defendant in error succeeded to the rights of that company; that the St. Louis, Lawrence, and Denver Railroad Company built its road upon the land in controversy under a contract for the right of way made with Thomas Pilcher in his lifetime, and without any notice from the plaintiff of any objection upon her part. The court found that the terms and conditions of the contract cannot be stated from the evidence.

It will be seen that the substance of the findings of the court is, that some contract for the right of way over the land was made by the railroad company with Thomas Pilcher, in his lifetime. The railroad company now prefers to put it in the light of a parol agreement rather than in the light of a parol license. In this view, it is not necessary to pass upon a question much discussed in the briefs, as to whether a license under which work has been done and money expended is revocable. Assuming that there was a parol agreement between these parties, founded on the several considerations claimed,—these being a change of route, so as to locate on the Pilcher homestead, the erection and maintenance of a depot, the employment of Pilcher's son by the company, and every other consideration alleged,—the question then remains: Is the right of way of a railroad through and across the homestead such an interest, encumbrance, lien, or diversion from its proper use as to require the joint consent of the husband and wife? This is an important question, and it is not to be disposed of without careful consideration. The tacit condition underlying the title to all land in this state is, that in case it shall be wanted for public use, it can be taken by paying just compensation therefor; if only a part is taken, just compensation is made for that, and for the injury or depreciation of the remainder of the tract.

By the statutes of this state, railroad companies are allowed to appropriate land for public purposes, and the perpetual use of such land is vested in the company, its successors and assigns. The difference between the perpetual use of land and the fee to it is only nominal. The interest a railroad company acquires in land in this state for a right of way, while only an easement, may be permanent in its nature, and may be practically exclusive. The value of the remaining fee, burdened by such an easement of perpetual use, is only nominal: *Robbins v. St. Paul etc. R. R. Co.*, 22 Minn. 286; *Washington Cemetery v. Prospect Park etc. R. R. Co.*, 68 N. Y. 591; *Bemis v. Springfield*, 122 Mass. 110. The statute seems to recognize this, because it requires the commissioners to assess the value of the land taken. The amount of land used by the railroad company in this case is about seven acres, of which it had necessarily the exclusive control and perpetual use. Of course, if the husband can grant the right of way to this railroad company, he can grant it to others, and by this means the wife and children can be deprived of the use and enjoyment of a greater part of the homestead. This court held, in the case of *Coughlin v. Coughlin*, 26 Kan. 116, that "the husband cannot, without the consent of the wife, execute a lease of a homestead, and give possession thereof to a tenant." In this case the lease was executed for five years, but we apprehend the length of the term of the lease can make no difference, the reason of the rule being based upon the general principle deducible from our organic law, that the husband can do no act that will interfere with the occupancy and use of the homestead without the consent of the wife. It has been held by many courts of last resort that the right of way of a railroad across the land conveyed is such an encumbrance as is a breach of the covenants against encumbrances. A leading and early case is that of *Kellogg v. Ingersoll*, 2 Mass. 97, decided by Chief Justice Parsons, approved by the cases of *Prescott v. Trueman*, 4 Id. 627; *Harlow v. Thomas*, 15 Pick. 68; and *Prescott v. Williams*, 5 Met. 433. To the same effect are the following cases: *Mitchell v. Warner*, 5 Conn. 497; *Hubbard v. Norton*, 10 Id. 423; *Herrick v. Moore*, 19 Me. 313; *Haynes v. Young*, 36 Id. 557; *Lamb v. Danforth*, 59 Id. 322; 8 Am. Rep. 426; *Prichard v. Atkinson*, 3 N. H. 335; *Clark v. Estate of Conroe*, 38 Vt. 469; *Kellogg v. Malin*, 50 Mo. 496; 11 Am. Rep. 426; *Beach v. Miller*, 51 Ill. 206; 2 Am. Rep. 290; *Barlow v. McKinley*, 24 Iowa, 69.

All the authorities state that an easement constitutes an encumbrance on land, and interferes with the absolute dominion, exclusive use, and uninterrupted enjoyment of it. A remark of Judge Valentine, in the case of *Randal v. Elder*, 12 Kan. 261, is quoted by counsel for defendant in error as in opposition to this line of authorities, but when his remark is considered in the light of the facts in that case, and the question he was discussing, it will be found not to warrant any such interpretation. The question was, whether the debtor could hold as a homestead two or more town lots, separated from each other by an alley, and it was held that he could not; and it is said in this connection that an easement might be created upon or through the land without in any manner affecting its character as a homestead. The court meant that the easement would not so divide the land, or segregate one tract from another, but that a homestead would be claimed on the whole tract, and this we indorse now as the law of this case, and would hold, if necessary, that while the homestead right of the plaintiff is encumbered by the right of way, it is still her homestead on both sides of the strip of land used by the railroad company.

We have not overlooked the case of *Randall v. Texas Cent. R'y Co.*, 63 Tex. 586, which decides, in effect, "that the husband may, without being joined by his wife, grant a right of way to a railway company across a tract of land belonging to himself and wife, and occupied by them as a homestead." We cannot follow that case; the statement in the *syllabus* is, that the land belonged to husband and wife, and if by that it is meant that the title vested in them both, the grant by the husband would not bind the separate property of the wife. This is so clear that elaboration would not be justified. A reason given is, that the husband can lease the homestead in Texas without the consent of the wife. This cannot be done in this state, if the lease would in any manner interfere with the wife's occupancy and use of the homestead. The court says: "If the husband should attempt to so exercise this right as to destroy the homestead, or to materially affect it as such, upon proper application the courts would interpose with their equitable power to prevent it." We think the best protection to the wife and children is by a total denial of the right of the husband to encumber the land for this purpose, except with the joint consent of the wife.

The case of *Chicago & S. W. R. R. Co. v. Swinney*, 38 Iowa,

182, has been examined with some care; it holds that "the husband can convey a right of way over the homestead without the concurrence and signature of the wife to the deed, when such conveyance will not defeat the substantial enjoyment of the homestead as such." The qualifying expression involves trouble. Who is to determine whether or not the right of way will not defeat the substantial enjoyment of the property? The court says, if the homestead were a single lot, and the right of way occupied it all, or most of it, the case would be very different. Why different? The rule of the Iowa case is too flexible. We cannot adopt it. In this state, all questions affecting the rights of the wife and children in the homestead must be discussed and determined by the constitutional and statutory enactments regarding them. These create them, fix their limits, direct their operation, and have such mandatory force of expression that this court can discharge its duty respecting them only by a strict adherence to the letter of the organic command. The homestead law is a part and parcel of the public policy of the state, and its provisions in cases of this character cannot be waived or avoided except by an exact and literal compliance with the mode and manner it has prescribed.

A steady and unwavering adherence to the exposition of the scope and bearing of this provision of the constitution as made in the early case of *Morris v. Ward*, 5 Kan. 239, is not only demanded by its express terms, but the improvidence and necessities of the father and husband are so frequent, the avaricious attacks and greedy encroachments of creditors are so persistent and insinuating, that all judicial powers must be constantly exerted to preserve to the beneficiaries the full extent and measure of this great constitutional creation. Its immunity from such attacks can best be protected by repeated judicial declarations that no interest, encumbrance, or lien can attach to or affect the homestead, unless given by the joint consent of husband and wife, except those specifically mentioned in the organic law. The only way to bind the wife to an alienation, lien, encumbrance, contract of sale, lease, or any interest whatever in the homestead that will interfere with or deprive her of the free use, occupancy, and enjoyment of all and every part thereof, is her consent, freely given, jointly with that of her husband. The fact of joint consent is best evidenced by a writing to that effect, but the constitution does not in express terms require that it shall be so shown, and

hence it can be established by such facts and circumstances as the necessity of particular cases requires. Probably no greater amount of evidence or more strict proof will be required to establish it than is deemed necessary to establish any other material fact, but there certainly must be some showing of joint consent, as required by the constitution. There is no special finding of the court below that there was consent on the part of the plaintiff in error. It is true that it may be fairly said that it is included in the general judgment, but we are of the opinion that all the findings, taken and considered together, do not authorize such a judgment. There is not such an affirmative showing in this case as satisfies a reasonable mind that there was the required consent. Silence is not enough under the circumstances of this case. The execution of deeds of a part of the homestead to the children, in which the right of way of the railroad is referred to as a boundary line, is not so positive an act of recognition as to imply previous consent, for it is difficult to perceive how the recognition of a natural or artificial object, as a dividing line, can be held to imply the legality of the existence, or the right of its location at that particular place.

Then again, the finding as to the alleged parol agreement between Thomas Pilcher and the railroad company is not complete; there may have been such an agreement, but what its terms of conditions were or are cannot be stated. How can specific relief be granted on such an intangible basis? Under the evidence and findings, the plaintiff in error had an undoubted right to recover the possession of that portion of the right of way over which the running of trains had ceased, and the use of which for railroad purposes had been abandoned.

For these material errors, it is recommended that the case be reversed and remanded, with instructions to sustain the motion for a new trial.

By the COURT. It is so ordered.

HUSBAND CANNOT ALIENATE HOMESTEAD WITHOUT WIFE'S CONSENT; See note to *Poole v. Gerrard*, 65 Am. Dec. 484-486; *Welch v. Rice*, 98 Id. 556; *Simpson v. Houston*, 97 N. C. 344.

SMITH v. LEIGHTON.

[38 KANSAS, 544.]

EVIDENCE. — WHERE GENERAL OBJECTION ONLY IS RAISED TO INTRODUCTION OF RECORD COPY OF DEED conveying land, which copy would have been admissible under certain circumstances, such objection is not available for the purposes of error.

GROWING GRASSES ARE A PART OF THE LAND as a general rule, whether such grasses are wild or cultivated, and an agreement in writing is required for their sale and severance from the land.

GROWING CROPS PASS TO THE GRANTEE, as between grantor and grantee to a deed of conveyance, where there is no reservation of grass or exception of any kind; and the grantee, as against a tenant of the grantor, has a right to the crops, and to collect all unpaid rents.

W. A. Randolph, for the plaintiff in error.

Kellogg and Sedgwick, for the defendant in error.

JOHNSTON, J. This proceeding springs up for review a judgment rendered in an action brought by C. A. Leighton against Elias Smith, to recover the value of certain grass which Smith cut and carried away from the premises of Leighton. On July 10, 1883, and for some time prior thereto, one V. Lillard owned a quarter-section of land in Lyon County, which on that day he sold and conveyed by warranty deed, without reservation, to C. A. Leighton. Before that time, he had leased the land to Elias Smith for the year 1883, and Smith had sublet it to A. Hill, who was in possession before the sale of the land; and in May, 1883, Lillard made a verbal sale of some grass growing on a certain meadow of the premises for sixty-five dollars. About the last of July or the 1st of August, 1883, Smith cut and took the grass from the premises; and subsequently, when Leighton demanded compensation for the grass, Smith stated that he was ready to pay for the same as soon as he learned to whom payment should be made. Trial at the April term, 1886, when Leighton recovered \$75.78, which is the amount Smith agreed to pay for the grass, together with seven per cent interest. The defendant brings the case to this court.

The first error assigned here is the admission in evidence of the record copy of the deed from Lillard to Leighton, conveying the premises upon which the grass grew. The original deed was admissible in testimony for the purpose of showing whether there had been any reservation made by Lillard when the land was conveyed. The copy of the deed was not the best evidence, and was not admissible unless a proper

foundation was laid for the introduction of secondary evidence. Only a general objection, however, was made to the introduction of the copy. If the original deed was not in the possession or control of the plaintiff, the record copy could be introduced in evidence, and being admissible under certain circumstances, a general objection was not available for purposes of error. It has frequently been held "that where evidence is apparently admissible for any purpose, or under any circumstances, the court does not err in admitting the same, unless the reasons for its exclusion are given by the party objecting": *Ferguson v. Graves*, 12 Kan. 43; *Botkin v. Livingston*, 16 Id. 41; *Cross v. National Bank*, 17 Id. 336; *Kansas Pac. R'y Co. v. Cutter*, 19 Id. 83; *Humphrey v. Collins*, 23 Id. 549.

It is next contended that the court erred in excluding evidence offered by Smith, and also in directing the verdict in favor of Leighton. We think the result reached is substantially just and correct. Smith claimed the right to the grass by virtue of a parol agreement with Lillard, by which he was to pay sixty-five dollars for the grass when cut; and also claimed that the purchase price of the grass was for the rent of the meadow-land on which it grew. The land upon which the grass stood was conveyed to Leighton subsequent to the parol agreement, and while the grass was yet green and growing. It is stated that the grass was growing on an inclosed and cultivated meadow; but it does not appear whether it was an annual or perennial growth. It is a general rule that growing grasses, whether wild or cultivated, are a part of the land, and require an agreement in writing for their sale and severance from the land. Smith contended that this agreement is within some of the exceptions to the general rule, and sought to bring it within the claimed exceptions by offering to show that Leighton knew of his lease upon the land, and of the sale of the grass, prior to his purchase of the land, which offer was refused. However, as the case comes up, we need not examine the sufficiency of this contention, or the competency of the testimony. In the deed of conveyance from Lillard to Leighton there was no reservation of the grass, or exception of any kind. In such a case, and as between grantor and grantee, it is well settled here that the growing crops pass to the grantee: *Garanflo v. Cooley*, 33 Kan. 137; *Chapman v. Veach*, 32 Id. 167; *Babcock v. Dieter*, 30 Id. 172; *Smith v. Hague*, 25 Id. 246. When the conveyance was

made and delivered, it carried with it the right to the crops and to collect all unpaid rents; in other words, Leighton was substituted as owner and landlord in place of Lillard. There being no reservations, Lillard from that time forth had no claim upon the crops or the rent due from the tenants. Smith had not paid for the grass, and whether the amount agreed to be paid is treated as the purchase price of the grass, or as rent money for the meadow, is immaterial. Smith was owing the price of the grass to some one, and he refused to pay only because he did not know to whom it was due. The amount found by the jury as the value of the grass is the same as that which Smith had agreed to pay for the same, with interest to the time of judgment, and the payment of this judgment will discharge Smith from all liability for the grass.

The judgment of the district court will be affirmed.

GENERAL OBJECTION TO EVIDENCE IS NOT GROUND FOR REVERSAL, if evidence is admissible for any purpose: *Turner v. Newburgh*, 4 Am. St. Rep. 453, and note.

GROWING CROPS, AS BETWEEN VENDOR AND VENDER, are part of the realty, and pass to the vendee: *Turner v. Coole*, 85 Am. Dec. 449; *Pattison's Appeal*, 100 Id. 637.

ATCHISON, TOPEKA, AND SANTA FE RAILROAD CO. v. GANTS.

[88 KANSAS, 603.]

RAILROAD COMPANY MAY ADOPT REGULATION THAT CERTAIN TRAIN SHALL NOT STOP AT DESIGNATED STATIONS where there is no statutory provision to the contrary.

RAILROAD PASSENGER MUST INFORM HIMSELF WHETHER TRAIN STOPS AT STATION. It is the duty of a person about to take passage on a railroad train to inform himself when, where, and how he can go or stop according to the regulations of the company.

DUTY OF PASSENGER TO PAY EXTRA FARE — RIGHT OF CONDUCTOR TO EJECT PASSENGER. — Where, in the absence of statutory provisions to the contrary, regulations are made by a railroad company that a fast passenger train shall only make certain stoppages, and a person by mistake or wrongfully takes passage thereon for a station where the train does not stop, it is his duty, when demand is made therefor, to pay the extra fare which in addition to the sum paid for his ticket would have entitled him to ride to the first stopping-place beyond, and if he refuses to do this, the conductor has the right to stop the train and require such passenger to leave it.

CARRIERS OF PASSENGERS — PAYMENT OF EXTRA FARE — DAMAGES. — Where mistake of passenger in getting on train which did not stop at his sta-

tion is induced by the company's ticket agent, and he is compelled to pay extra fare to first place of stoppage, such extra fare would be a proper element of damages in addition to such as were occasioned by the failure to take him to the station to which he was going. But if after boarding the train, and before it started, correct information was afforded him, by the announcement of the brakeman or otherwise, such as a reasonable and prudent man would not neglect, he could not thereafter rely upon the incorrect statements of the agent.

RAILROAD PASSENGER MAY NOT ASSERT AND MAINTAIN BY FORCE HIS RIGHTS TO TRANSPORTATION ON TRAIN. If he is a trespasser, it is his duty to go off without being forced to do so, and he has no legal right to forcibly resist the conductor's rightful efforts to eject him. If he is on the train by mistake induced by an agent of the company, it is not necessary in such case for him to invite force to be exerted by the conductor to secure his rights, — certainly not to increase his damages.

RAILROAD PASSENGER MAY BE EJECTED FROM TRAIN AT PLACE OTHER THAN DEPOT or station, provided care is taken not to expose his person to serious injury or danger. The company is not required to consider the mere convenience of the wrong-doer.

CARRIERS OF PASSENGERS—EJECTING PASSENGER FROM TRAIN—MEASURE OF DAMAGES. — Where passenger resists to the utmost of his power and ability an attempt to eject him from the train, he ought not to complain of the force used if there was no intention on the part of the conductor or his assistants to commit unnecessary injury, even if his resistance might have been overcome with something less of force than was actually used. But if such passenger, although a trespasser upon the train, received injuries which were the direct and necessary result of willful, wanton, or malicious acts of the conductor or those assisting him, he is entitled to his damages.

EVIDENCE AS TO WHETHER PERSON WAS OR WAS NOT ACCUSTOMED TO USE PROFANE AND OBSCENE LANGUAGE is incompetent and immaterial upon question whether such person, in being ejected from railroad car had used such language.

WITNESS MAY NOT BE ASKED ON CROSS-EXAMINATION a question which does not tend to rebut, impeach, modify, or explain any of his testimony.

CONDUCTOR REPRESENTS COMPANY ONLY AS TO HIS OWN TRAIN. — A conductor in the line of his duty in collecting fare, taking up tickets, and in giving information to the passengers on his train, represents the company only as to the running and operation of his own train.

EJECTION FROM RAILROAD TRAIN WITH AID OF PASSENGERS—RESPONSIBILITY OF COMPANY THEREFOR. — It is not necessary that conductor should have expressly directed passengers to aid in ejection, but if such aid was rendered by passengers with the permission and sanction of the conductor or the train-men, an employment might rightfully be inferred, otherwise where the passengers were mere interlopers, and the conductor had no opportunity to interfere with their actions.

George R. Peck, A. A. Hurd, C. N. Sterry, and Robert Dunlap, for the plaintiff in error.

Ady and Henry, for the defendant in error.

HORTON, C. J. On May 19, 1885, A. C. Gants, a hotel clerk at Wichita, took passage on a train of the Atchison, Topeka, and Santa Fe Railroad Company from Wichita to Newton, intending to go to Peabody. He paid his fare to the conductor on the train from Wichita to Newton. He claims he was told by the conductor of the Wichita train that he could either continue on the train or go upon one an hour later. While at Newton, he purchased a ticket over the Atchison road for Peabody, and paid for it fifty cents. He remained at Newton nearly an hour, to get shaved and look around the town, and about nine o'clock he took his seat in a car of a train at the depot; this was the eastern fast train, commonly called the "cannon ball." According to the regulations of the railroad company, this train was scheduled not to stop at Peabody except for the purpose of letting off passengers who had taken passage at some point west of Newton; but when it had no such passengers, it would not stop at Peabody going east, and its first stopping-place would be Florence; Peabody is a station between Newton and Florence, about four miles west of Florence; the local train which stopped at Peabody left Newton before the "cannon ball." According to the evidence of the railroad company, a brakeman upon the "cannon ball" announced, before the train started, that "it would not stop until it got to Florence." Gants testified that just as the train started from Newton a train-man came to the car door and said, "this train will not stop until it gets to Florence," but he claims he did not know then where Florence is. He further testified: —

"Q. How long did the train, which you say you boarded and saw headed toward the east, remain there? A. I think about twenty minutes.

"Q. You had ample opportunity to get a ticket, and had ample opportunity to ask the men who were employed about that train, whether that train stopped at Peabody? A. Yes, sir, I expect I did, if I wanted to.

"Q. You made no inquiries? A. No, sir.

"Q. It is a fact, from the time you arrived on the train going from Wichita to Newton you made no inquiries as to that train, as to what time the train started, and whether it stopped at Peabody? A. No, sir.

"Q. Never made any inquiries, either of the ticket agent or any person who had apparently charge there, although the

train was standing there fifteen or twenty minutes after it got there, and while you were there? A. I do not think I did.

“Q. How soon did you get aboard this train before it started? A. I cannot say; probably five minutes.”

Gants, however, testified that when he bought his ticket for Peabody at Newton he was told by the agent who sold him the ticket “to take the next train.”

After the “cannon ball” train had left Newton and gone about three miles, the conductor called upon Gants for his ticket; he presented a ticket for Peabody, and the conductor informed him that the train did not stop at Peabody, and demanded from him thirty-four cents in addition to his ticket for the fare from Peabody to Florence; Gants refused to pay the additional fare; the conductor then informed him that if he did not pay, in addition to his ticket, the fare from Peabody to Florence, he would have to stop the train and put him off; Gants replied “that he would have to put him off, as he would not pay any farther”; the conductor then told him he would put him off, and stopped the train for that purpose; after the train had been stopped, the conductor in a gentlemanly manner requested Gants to leave the train; he refused to get off, and dared the conductor to put him off; he resisted being put off to the utmost of his power and ability; on account of this resistance the conductor was unable himself to remove him; but with the assistance of two or three persons he succeeded in ejecting him from the train; after the train stopped, and while the conductor was attempting to eject Gants from the car, a severe altercation took place between them; the railroad company offered evidence tending to show that Gants during this time used vile and profane language to the conductor in the car, which contained many passengers, a number of them being ladies.

After Gants was ejected from the train he walked a portion of the way back to Newton, and then got upon a hand-car and rode to Newton, arriving there between ten and eleven o'clock in the forenoon; in the afternoon or evening of the same day, he went to Peabody from Newton upon a local train, and the same day returned to Wichita. Upon his part, he claims that he was wrongfully ejected from the train, and was unlawfully kicked, bruised, and injured in being ejected. This action was brought to recover damages therefor; verdict and judgment for Gants, for four thousand dollars. The railroad

company moved for a new trial, which was refused, and it brings the case here.

The important questions presented in the record are: 1. Whether the railroad company had the right to eject Gants from the train; 2. If the railroad company had that right, and Gants resisted to the utmost of his power and ability, whether he can recover for the injuries inflicted in his removal, unless they were willful, wanton, or malicious. The law is well settled that, in the absence of statutory provisions to the contrary, a railroad company may adopt a regulation that a certain train or trains of passenger-cars running regularly on its road shall not stop at designated stations or places; and it is the duty of a person about to take passage on a railroad train to inform himself when, where, and how he can go or stop, according to the regulations of the company: *Pittsburg etc. R'y Co. v. Nuzum*, 50 Ind. 141; *Beauchamp v. International & G. N. R. R. Co.*, 56 Tex. 239; *Lake Shore etc. R. R. Co. v. Pierce*, 47 Mich. 277; *Ohio & Miss. R'y Co. v. Swarthout*, 67 Ind. 567; 33 Am. Rep. 104; *Henry v. St. Louis etc. R. R. Co.*, 76 Mo. 288. In this state there is no statutory provision to the contrary, and as the train upon which Gants took passage was not to stop, under the regulations of the company, until it reached Florence, the conductor had the right, after the train started, to stop the train and require Gants to leave it, if he refused to pay the fare which, in addition to the sum paid for his ticket, would have entitled him to ride to Florence: *Fink v. Railroad Co.*, 4 Lans. 147; *Lake Shore etc. R. R. Co. v. Pierce*, *supra*; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276. It was the duty of the railroad company to the public to run its trains according to its regulations, and it was also the duty of Gants to have informed himself whether the train stopped at Peabody. It is claimed, however, upon his part, that when he purchased his ticket he was told by the agent to take the next train, and therefore that he was without fault in getting upon the "cannon ball." In his direct examination, Gants testified:—

"Q. Upon your arrival at Newton, what did you do? A. I bought a ticket, and went up town.

"Q. For what purpose? A. I wanted to get shaved and look around the town a little.

"Q. How long did you remain in Newton? A. Why, I should say a little over an hour; a little over an hour, perhaps."

If he purchased his ticket immediately upon his arrival at

Newton, the agent at the depot very properly told him "to take the next train," as there was evidence tending to show that a local train which stopped at Peabody left Newton for the east soon after Gants reached there. Subsequently, in his examination, Gants testified that he bought his ticket after he got shaved and had looked around the town. If this be true, and he was misinformed by the ticket agent, and thereby induced to take the fast train going east, which did not stop at Peabody, this would give him a remedy against the railroad company for its breach of contract, but would not justify him in refusing to leave the train when ordered so to do by the conductor. "The business of railroads can only be carried on safely by having regularity. If trains are arranged in a certain way, and their time fixed with regard to limited stoppages, a conductor would never be safe if he were bound at his peril to ascertain from any mere stranger the existence of an agreement by the company to change the arrangement, and stop at an unusual place": *Lake Shore etc. R. R. Co. v. Pierce, supra*.

Under all the evidence in the case, whether Gants was upon the train by mistake or wrongfully, he should have paid the extra fare to Florence, when demanded, or left the train when it stopped and he was ordered to get off. If his mistake was induced by the company's ticket agent, then the fare from Peabody to Florence would be a proper element of damages, in addition to such as were occasioned by the failure to take him to Peabody on the train which he was told to take. If, however, he was misinformed by the local agent, but subsequently, after entering the train and before it started, was afforded such means of correct information, by the announcement of the brakeman or otherwise, as a reasonable and prudent man would not neglect, he could not thereafter rely in good faith upon the incorrect statement of the agent from whom he bought his ticket. Even if Gants made a mistake in taking the train, induced by the ticket agent, it was not necessary for him to invite force to secure his legal demands. In *Townsend v. New York Cent. R. R. Co.*, 56 N. Y. 295, Grover, J., said: "No one has a right to resort to force to compel the performance of a contract made with him by another. He must avail himself of the remedies the law provides in such case."

In *Bradshaw v. South Boston R. R. Co.*, 135 Mass. 407, Allen, J., said: "If a railroad company has agreed to furnish a passenger with a proper ticket and failed to do so, he is not at

liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that in a moment of irritation or excitement it may be unpleasant to a passenger who has once paid to submit to an additional exaction. But unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket."

In *Penn. R. R. v. Connell*, 112 Ill. 295, Craig, J., said: "We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place he was ejected from the cars to New York. He was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion, and all additional expense necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train; but we perceive no ground upon which he can recover for personal injuries received, unless the expulsion was malicious or wanton."

In *Hall v. Memphis etc. R. R. Co.*, 15 Fed. Rep. 61, Hammond, J., said: "The conductor is somewhat like the master of a ship. He has police powers and disciplinary control over the train, and the quiet and comfort of the passengers and their safety are under his protection. He should be obeyed by the passengers, and the common notion that force must be invited to secure legal demands against his unlawful exactions is in my judgment erroneous and vicious. All that a passenger need do is to express his dissent to the demand made upon him, and he need not require force to be exerted to secure his rights,—certainly not to increase his damages. . . . I fully recognize the feeling of a 'free American citizen' in the face of threatened wrong or insult, but the safety of the ship forbids that he should fight with the master, and

imperil the ship and lives and property she carries. Better that he should suffer the wrongs than to endanger or discomfort his fellow-passengers. The conductor of a railroad train is not altogether as supreme, perhaps, as the master of a ship; but on analogous principles, that seem to me obvious, it is, I think, the duty of the passenger to avoid resistance beyond mere dissent, and submit to his authority without more than mere protest, unless resistance is necessary to defend himself against impending personal injuries." See also *Southern Kansas R'y Co. v. Rice*, 38 Kan. 398; *ante*, p. 766; *Southern Kansas R'y Co. v. Hinsdale*, 38 Kan. 507.

Clearly, if Gants was a trespasser upon the train, as this case was put to the jury, then the conductor had the right to put him off, and it was his duty to go off without being forced to do so. If the conductor had the right to put him off, Gants at the same time could not have a legal right to resist, and necessarily he could not resist the conductor in the discharge of a duty and the exercise of a right, and by that resistance acquire a right to resort to any force to overcome it. Of course, we do not intend to intimate that a trespasser upon a train can be treated in a willful, wanton, and malicious manner: *Kansas City, Ft. S. & G. R. R. Co. v. Kelly*, 36 Kas. 655; 59 Am. Rep. 596.

In the conclusion which we have reached regarding the right of the conductor to eject Gants from the train, even if he made a mistake in taking it, induced by the ticket agent, upon his refusal to pay the fare demanded, we do not overlook the fact that a railroad company is a public carrier, and that some of the authorities are in conflict with the doctrine herein announced. A moving train filled with passengers, including ladies and children, is not the place for a wrangle, a quarrel, or a fight with the conductor. The interests of the public are to be considered in such a case, as well as the interests of a private individual. As was said in *Railroad Co. v. Connell*, *supra*: "It would be unwise and dangerous for the traveling public to adopt any rule which might encourage resort to violence on a train of cars." This conclusion will prevent breaches of the peace upon railroad trains instead of producing them, and at the same time will fully protect the passenger by making the company responsible for all damages resulting from any breach of its contract. In addition to this, if a passenger has suffered in his business, or been put to expense by the delay or refusal of the railroad company to

carry him as promised by its ticket agent, he would be entitled to ample damages therefor. In this connection, it is well to state, that where a trespasser is ejected from a train, such ejection may be at a place other than a depot or station, provided care is taken not to expose his person to serious injury or danger; but in such an ejection, the railroad company is not required to have consideration for the mere convenience of the wrong-doer: *Lillis v. St. Louis etc. R'y Co.*, 64 Mo. 464; 27 Am. Rep. 255; *McClure v. Philadelphia etc. R. R. Co.*, 34 Md. 532; *Great Western R. R. Co. v. Miller*, 19 Mich. 305; *O'Brien v. Boston etc. R. R. Co.*, 15 Gray, 20; 77 Am. Dec. 347.

The trial court, in its instructions to the jury, treated Gants as a trespasser upon the train, after he refused to pay fare from Peabody to Florence, and to leave the train; but further instructed the jury as follows:—

“8. If you find, from the evidence, that an unnecessary degree of force was employed, and that plaintiff was injured thereby, in that case he would be entitled to recover in this action.”

“11. But in determining what is a reasonable degree of force under the circumstances of this case, you should consider the amount of resistance opposed by the plaintiff to those who were attempting to eject him; and if you find that the plaintiff suffered injuries which were the direct and necessary result of the application of force rendered necessary by his own resistance, he cannot recover for such injuries; but the use of a degree of force disproportionate to the resistance to be overcome would render the train-men wrong-doers in turn, and would render the company liable for any injuries committed by reason thereof.

“12. I instruct you that, if the plaintiff had exerted himself to the utmost in resisting the efforts of the train-men to expel him, and that, in overcoming such resistance, the train-men used more force and violence than were necessary for the purpose, and without any intention to commit unnecessary injury plaintiff was injured thereby,—in such a case, the resistance offered by the plaintiff may be considered in mitigation of damages.”

“20. If, under the evidence and instructions of the court, the jury find for the plaintiff, then, in estimating the plaintiff's damages, if any are proved, you have a right to take into consideration the personal injury inflicted upon him,

the pain and suffering undergone by him in consequence of his injuries, if any are proved, the loss of time occasioned thereby, the reasonable cost of medical attendance, and also the permanent loss or damage, if any is shown, arising from disability, resulting to the plaintiff from the injury in question, rendering him less capable of attending to his business than he would have been if the injury had not been received; plaintiff would also be entitled for any sum of money lost by him as a direct consequence of the wrongful acts complained of, and if they were wrongful, any money was so lost; and if you further find from the evidence that the injury complained of was inflicted wantonly or willfully, and that the plaintiff has sustained damages thereby, then the jury are not limited in assessing the damages to mere compensation for damages actually sustained; but you may give him a further sum, by way of exemplary or vindictive damages, as a protection to the plaintiff, and as a salutary example."

The railroad company requested the following instruction, which was refused: "In determining the question in this case as to whether the train-men on the train from which plaintiff was ejected used more force or violence than was necessary to be used in ejecting plaintiff from such train, you are to take into consideration the amount of resistance offered by plaintiff to such ejection; and if you find that he resisted the attempt of the conductor to put him off from such train with all the force and power he was capable of using, then, and in such a case, you are instructed that the law will not with a nicety weigh the amount of force necessary to be used in overcoming such resistance, and that in such case the defendant would only be liable in a case of palpable and perfectly apparent use of force beyond that which was clearly necessary to be used in overcoming the resistance offered by plaintiff."

If Gants was a trespasser upon the train, the conductor had the right to eject him, and we think the railroad company can only be made responsible for the injuries inflicted which were willful, wanton, or malicious.

In refusing to give the instruction prayed for, and in giving to the jury the twelfth instruction, and also the twentieth, the court made the railroad company liable in damages for all excessive force used in overcoming the resistance of Gants, although such force was used "without any intention on the part of the conductor or those assisting him to commit injury." The first clauses of the twentieth instruction permitted Gants

to recover for "the personal injuries inflicted upon him, and the suffering undergone by him in consequence of his injuries," although a part of the injuries may have been occasioned in overcoming his own unlawful resistance. In *Galbraith v. Fleming*, 60 Mich. 403, the court said: "The law does not put a premium upon fighting, and one who voluntarily enters into a quarrel will not be afforded relief for his own wrong in damages if he come out second best. While the voluntary act on the part of the plaintiff would not preclude the state from punishing him or the defendant for a breach of the peace, it nevertheless prevents him from bringing a civil action to recover compensation for injuries received by his own seeking and in violation of law."

In *Taylor v. Clendening*, 4 Kan. 524, it was held that "where a person who was the original aggressor in an affray met with too vigorous a defense, and sued for damages on account of the injuries, could not recover of his intended victim."

It has been decided by this court, time and again, that whenever it appears that the plaintiff's negligence or wrongful act had a material effect in producing the injury, or substantially contributed toward it, he is not entitled to recover; and further, that if a plaintiff is first in fault in infringing upon a defendant's rights, the defendant is absolved from all but slight care, and is liable only for gross or wanton negligence: *Union Pacific R'y Co. v. Rollins*, 5 Kan. 167; *Kansas Pacific R'y Co. v. Pointer*, 14 Id. 37. In the latter case, it was said by Brewer, J.: "Many considerations, especially the difficulty of correctly apportioning the damages, and determining to what extent the wrong of the respective parties was instrumental in causing the injury, uphold the rule so universally recognized, that where the wrong, the negligence of both parties, contributes to the injury, the law will not afford any relief."

In this case, Gants could have remained upon the train and gone to Florence by paying the fare from Peabody to that station; or when the train stopped he could have left the train when requested to do so by the conductor in a gentlemanly manner; and it is clearly evident that if he had done either he would not have suffered any personal injuries at the hands of the conductor or train-men. He stubbornly refused to pay the additional fare, and also forcibly resisted when requested to leave the train. He did all of this after the conductor had

informed him that the train would not stop at Peabody, and that he must pay to Florence or get off. Under the rule established in this state in *Taylor v. Clendening*, 4 Kan. 524, so long ago as 1868, Gants ought not to recover, even if his resistance might have been overcome with something of less force than the conductor and his assistants actually used, unless such excessive force was willful, wanton, or malicious.

By resisting to the utmost of his power and ability Gants invited force; and he ought not to complain of the force used if there was no intention upon the part of the conductor or his assistants to commit unnecessary injury. On the other hand, if Gants, although a trespasser upon the train, received injuries which were the direct and necessary result of willful, wanton, or malicious acts of the conductor or those assisting him, he is entitled to his damages: *Kansas City, Ft. S., & G. R. R. Co. v. Kelly*, *supra*.

Counsel for Gants insist that the decisions are that a trespasser can recover for all injuries arising from the use of unnecessary force, without regard to whether it was willful, wanton, or malicious; and also insist that this court has recognized this rule in *M. K. & T. R. R. Co. v. Weaver*, 16 Kan. 456, and *Kansas Pac. R'y Co. v. Kessler*, 18 Id. 523. In the *Weaver* case, the railway company was found by the jury to have been the aggressor after the passenger had been ejected and put upon the ground. The expulsion in that case was held to have been wrongful, but as it did not seem to the court to have been wanton or excessively cruel, the damages were deemed excessive, and the judgment reversed. In the *Kessler* case, the court held that in the wrongful expulsion of the passenger from the train the railroad company was guilty of such gross negligence as amounted to wantonness; and yet, even then, with much hesitation it affirmed a judgment of eight hundred and twenty dollars only.

In several of the cases cited by counsel, where damages have been allowed for unnecessary force, the unnecessary force was wanton or malicious. In *McKinley v. C. & N. W. R'y Co.*, 44 Iowa, 314, the acts of the brakeman, for which the company was held liable, were malicious and criminal. In *Bass v. Chicago & N. W. R'y Co.*, 39 Wis. 636, the passenger peaceably and lawfully entered a ladies' car, in which there were many vacant seats, and when about to occupy one was rudely and violently seized by a brakeman, aided by a volunteer, and forcibly thrust from the car. The passenger

was not at first requested to leave the car or forbidden to enter it. In that case, the assault was willful, wanton, and malicious. In *Jackson v. Second Ave. R. R. Co.*, 47 N. Y. 274, the passenger tendered five cents for fare on a street-car, and the conductor demanded six. This was refused. The conductor caught the passenger around the waist, and stopped the car to put him out. The passenger refused to leave the car, and resisted; the conductor struck him a blow on his nose, but made no further attempt to eject him. The blow struck by the conductor was held by the trial court to have been willful and malicious, and the case was reversed, because it was not left to the jury to determine whether the act was done without malice or ill feeling. In *Hanson v. European & N. A. R'y Co.*, 62 Me. 84, 16 Am. Rep. 404, after the passenger has ceased all resistance, and was returning to his seat, with his back to the brakeman, the latter struck him several blows with an iron poker two feet long and half an inch in diameter, about the head and shoulders and over the eye. Evidently the assault of the brakeman in this case was also willful, wanton, and malicious. In *Coleman v. N. Y. & N. H. R. R. Co.*, 106 Mass. 160, the passenger who was ejected was struck two or three heavy blows behind the ear, and thrown bodily upon the platform of the depot. The trial court in that case instructed the jury that the railroad company was responsible for excessive or unreasonable force, but also stated to the jury that the passenger "had no right to resist the process of being put out." In the opinion in that case, it was said that "violence on the part of the passenger would increase the violence necessary and proper to be used on the part of the employees; and if it contributed in any degree to the violence of his fall, or to the aggravation of his disease, he cannot recover for the injuries he received. The burden was on him to prove that his own illegal acts did not in any degree contribute to the alleged injury, but that it was wholly caused by the wrongful acts of the railroad company's servants."

This language plainly implies that the unnecessary force must be wanton or malicious.

We think a critical examination of the decisions will demonstrate the general rule to be, that where parties are permitted to recover solely on account of injuries inflicted by unnecessary force or excessive violence, the facts in the cases disclose that the force or violence used was willful, wanton, or malicious; and that in most of the cases "unnecessary force" or

"excessive violence" was used as synonymous or tantamount to wanton or malicious force.

But counsel insist that the excessive force used in this case was willful and wanton; and therefore that the judgment should not be disturbed. We cannot assent to this. Under the instructions, the jury were not authorized to separate the force used in overcoming obstinate and forcible resistance with no intention to commit injury, from the force that was used willfully, wantonly, or maliciously, if any such force was used. Even if Gants was upon the train under the direction of the ticket agent, and without fault on his part, as before remarked, he should have paid the extra fare to Florence, as he was able to do, or left the train when it stopped. For the mistake of the ticket agent, or the wrong of the railroad company, if any, he had ample remedy: *Southern Kansas R'y Co. v. Rice*, 38 Kan. 398; *ante*, p. 766; *Wheeler and Wilson Mfg. Co. v. Boyce*, 36 Kan. 350; 59 Am. Rep. 571.

As a new trial must be ordered, we will dispose of the minor alleged errors. There was evidence on the part of the railroad company that, prior to his removal from the train, Gants used vile, obscene, and profane language. Gants introduced two witnesses to show that he was not in the habit of using obscene or profane language. One of the witnesses testified that he had known Gants over a year, and that he never heard him "use half a dozen oaths in his life." Another witness testified that he never heard him "use obscene language in public, but that he might have heard him make use of an oath sometimes, but not frequently." We do not think the answers of the witnesses very material, or as tending to prove much. Whether Gants had a great propensity to use obscene language is not important. If such evidence were permitted, it would present a collateral issue, and we do not think, under the authorities, that this evidence in this kind of a case is competent: *Thompson v. Bowie*, 4 Wall. 463; *Commonwealth v. Kennon*, 130 Mass. 39.

Also, the question permitted to be asked upon cross-examination of one of the witnesses as to the number of saloons in Las Animas and La Junta, Colorado, was wholly improper, because it did not tend to rebut, impeach, modify, or explain any of his testimony.

Again, we do not think that the evidence of what the conductor of the Wichita train told Gants was admissible. If it were true, it was not sufficient ground for Gants to refuse to

pay his fare to Florence, or to resist removal from the train. A conductor in the line of his duty in collecting fare, taking up tickets, and in giving information to the passengers on his train, represents the company as to the running and operation of his own train, but in this case the Wichita train stopped at Newton, and Gants had to change cars at that place in order to go to Peabody. In the case of *International & G. N. R. R. Co. v. Gilbert*, 64 Tex. 536, cited, the conductor instructed the passenger to keep her seat upon his train, although she had a ticket for a train that branched off in another direction. The court there very properly held that the answer of the conductor was equivalent to saying she was on the right train, and held the railroad company responsible in damages, but did not intimate that she could have increased her damages by refusing to leave the train when ordered: See *Cincinnati, H., & I. R. R. Co. v. Carper*, 112 Ind. 26. There was some evidence tending to show that Gants was removed from the train with the assistance of one or two passengers; and it is claimed on the part of the railroad company that the company is not responsible for their acts, unless they were requested by the conductor to assist. It was not necessary that the conductor should have given express directions to all concerned in the ejection, but if any passenger aided the conductor or the train-men, with his permission and sanction, a jury might infer an employment. If, on the other hand, the passengers were mere interlopers, and the conductor had no opportunity to interfere with their actions, it would not be fair that the railroad company should be held responsible for their acts.

The judgment of the district court will be reversed, and the cause remanded for a new trial.

COMMON CARRIER IS BOUND TO STOP AT ADVERTISED STATION: See note to *Heirn v. McCaughan*, 66 Am. Dec. 603-606; and see *Sears v. Eastern R. R. Co.*, 92 Id. 730; and *Chicago etc. R. R. Co. v. Flagg*, 92 Id. 133.

IN ABSENCE OF STATUTE, RAILROAD COMPANY MAY ADOPT REGULATION that trains shall not stop at designated places or stations; and it is the duty of the passenger, before going on the train, to ascertain where he can stop: *Ohio etc. R. R. Co. v. Swarthout*, 34 Am. Rep. 104.

COMMON CARRIER MAY EJECT PASSENGER FOR REFUSAL TO PAY FARE: Note to *Galena etc. R. R. Co. v. Parks*, 68 Am. Dec. 570-573; *Jeffersonville etc. R. R. v. Rogers*, 92 Id. 276; *Shular v. St. Louis etc. R. R. Co.*, 92 Mo. 339; and in absence of statute, may do so at place other than station: Id.; *Illinois Cent. R. R. Co. v. Suttin*, 92 Id. 81; *Illinois Cent. R. R. Co. v. Whittemore*, 92 Id. 138.

RAILROAD PASSENGER MAY NOT ASSERT AND MAINTAIN BY FORCE his right to transportation: See *Pennsylvania R. R. Co. v. Connell*, 54 Am. Rep. 238; *Kansas City etc. R. R. Co. v. Kelly*, 59 Id. 596; *Southern Kansas R'y Co. v. Rice*, ante, p. 766.

MEASURE OF DAMAGES FOR WRONGFUL EXPULSION OF PASSENGER: See *Southern Kansas R'y Co. v. Rice*, ante, p. 766.

WESTERN UNION TELEGRAPH COMPANY v. CRALL.

[38 KANSAS, 679.]

TELEGRAPH COMPANY MAY NOT LIMIT ITS LIABILITY so as to relieve itself against its own gross negligence by making a provision in its contract with the sender of a message that it will not be liable for unrepeatd messages happening by negligence of its servants beyond the amount received for sending the same, and this rule does not make the company an insurer.

MISTAKE IN SENDING TELEGRAM—BURDEN OF PROOF.—Where no testimony is introduced by the defendant company, the mere production of the message containing the mistakes is sufficient to establish gross carelessness by the company, and would throw upon it the burden of proof to excuse or explain its mistakes.

Waggener, Martin, and Orr, for the plaintiff in error.

Tomlinson and Eaton, for the defendant in error.

HOLT, C. On September 19, 1883, Jesse C. Crall, the defendant in error, by his son and agent, Graham Crall, delivered to the defendant company, at Atchison, Kansas, the following message, leaving out printed matter, etc.:—

“To J. B. SMITH, Esq., Eureka, Kansas: Ship Bones, sulky, and trap to Valley Falls, immediately. GRAHAM CRALL.”

The message received by Smith on the same day, at Eureka, omitting printed matter, etc., was as follows:—

“To J. B. SMITH: Ship Beons, sulky, and traps to Neosha Falls immediately. GRAHAM CROLT.”

“Bones” was the name of a trotting horse owned by Crall, and at that time in charge of Smith at Eureka. He immediately shipped the horse, sulky, and traps to Neosho Falls, where they remained several weeks before Crall ascertained where they were. Smith, being only temporarily in charge of the horse, left Eureka, and Crall had no communication from him, nor did he know his whereabouts until after the horse was found at Neosho Falls, although he made diligent inquiry for him. Trial was had at the February term, 1886, in the Atchison district court, and a jury being waived, the court

specially found that the message in the dispatch was very plainly written, in a large, round hand, so that no word in it could have been mistaken for any other word, if examined even with the slightest care; that the weather was fair and pleasant on and during all of the day on which the said dispatch was sent, both at Atchison and Eureka, and that there was no evidence of any electrical disturbance at any place on the line between said points. The seventh finding of fact is as follows: "There is no similarity in the telegraphic symbols or characters, nor in the sound made by the instrument in forming said symbols or characters, between the words 'Valley' and 'Neosho'; and there being no electrical disturbance, the three mistakes in the transmission of said message were the result of the gross negligence of the defendant's operators, or the gross negligence of the defendant in keeping instruments and appliances that were out of order and not in proper condition for use."

Crall brought his action against the telegraph company for the expense of keeping the horse, loss of its use, etc.; judgment was rendered for the plaintiff for \$136.10, and costs. The defendant company brings the case here for review. For a defense, the defendant relied upon the contract printed above the message sent by Graham Crall. It is as follows:—

"THE WESTERN UNION TELEGRAPH COMPANY.

"All messages by this company are subject to the following terms:—

"To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

"Correctness in the transmission of a message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent for any distance not exceeding one thousand miles, and two per cent for any greater distance. No employee of the company is authorized to vary the foregoing.

"No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

"Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

"The company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message."

Immediately above the dispatch, in print, was: "Send the following message, subject to the above terms, which are hereby agreed to."

The defense the telegraph company interposed will require an examination of the legal effect of this contract, to determine the liability, if any, of the defendant to the plaintiff. In the first place, it is well enough to consider the circumstances under which such contracts are usually made. The demand for haste and dispatch upon which the business of telegraphy is based virtually compels the sender of a message to accept the terms offered; often he has no choice in the selection of the company to do the work required, and then a single message is of comparatively little interest to the company,—simply the remuneration for sending it,—while it may be of great importance to the sender. He would probably have his right of action against the company to compel it to make a reasonable contract with him, for to a certain extent telegraph companies are *quasi* public servants, and owe the public certain duties, as they can exercise the right of eminent domain, and receive franchises. But he does not wish to be forced to compel it to make a fair and reasonable contract; his object is to have his message sent promptly, and he would therefore accept hard conditions at the hands of the company

rather than delay his business and seek redress in the courts. Under such circumstances the parties are not dealing on an equal footing. When the company has such an advantage, in consequence of the nature of its employment, it can easily dictate terms. It should not, however, be sustained in treating its patrons unfairly and inequitably, and supported in unconscionable contracts made under such circumstances: *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; Gray on Communication by Telegraph, sec. 48.

Was the contract itself a valid one? It is not claimed by the defendant in error that the telegraph company is an insurer of a message sent, nor that it cannot make reasonable regulations for carrying on its own business, but it is urged that a telegraph company cannot by contract exempt itself from all liability that may arise by reason of its own negligence in failing to provide suitable instruments, or from negligence of its operators and servants. He cites a long list of authorities that apparently support this contention. However, in disposing of this matter it is not necessary to pass upon the question urged, for in this case it is found by the court that the defendant company was guilty of gross negligence. The provision in the contract that the company will not be held liable for unrepeatd messages, happening by negligence of its servants, beyond the amount received for the sending of the same, is not valid to relieve it from liability against its own gross negligence. It is the duty of the telegraph company, when it receives a message and the money therefor, from the sender, to exercise care and diligence in transmitting it promptly and accurately. No contract should be sustained by the courts which would excuse it from gross negligence or willful misconduct in performing a service undertaken for another for hire. The current authorities to sustain this principle is unbroken. The interests are many and varied, depending upon the proper performance by it of the work it assumes; and it is against public policy that it should be allowed to stipulate for exemption from the exercise of care and diligence in this duty, which it has voluntarily taken upon itself. This rule does not make the telegraph company an insurer, but it does prevent it from evading its liabilities for its errors arising from gross negligence: *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168; 24 Am. Rep. 279; *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa,

433; 1 Am. Rep. 235; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437; *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452; *Ellis v. American Tel. Co.*, 95 Mass. 226; *Ayer v. Western Union Tel. Co.*, 79 Me. 495.

Was the telegraph company guilty of gross negligence? It is so found by the court below, and we think the findings are abundantly supported by the evidence in the case. In a message containing nine words, besides the address and signature of the sender, there were three mistakes; it was sent over defendant's own line, on a fair day, in which there were no electrical or atmospherical disturbances; and the court especially found that there was no similarity in the sounds, symbols, and characters used in telegraphy for the words "Valley" and "Neosho." There is no good reason, in the absence of atmospherical or electrical disturbances, why the message should not have been transmitted exactly as it was received. The art of telegraphy has been reduced to comparative exactness and certainty, and it was only by the gross carelessness of the operator, or the culpable imperfections of the instruments and appliance of the company, that such a mistake could have been made in transmitting the message so short a distance upon a calm, fair day.

There is no testimony introduced in this case by the defendant company, and we presume the mere production of the mutilated message would have been sufficient to establish the gross carelessness of the defendant. It would have thrown the burden of proof upon the defendant to excuse or explain its mistakes: *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263; 4 Am. Rep. 673; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Turner v. Hawk-eye Tel. Co.*, 41 Iowa, 458; 20 Am. Rep. 605. The plaintiff did prove, in addition, that the weather was favorable for the use of defendant's wires and instruments.

We believe that the findings of the court are sustained by ample testimony showing gross negligence on the part of the company, and that the contract urged as a defense by the defendant is of no legal force whatever, when it is attempted thereby to relieve the company of its gross negligence.

We recommend that the judgment be affirmed.

By the COURT. It is so ordered

TELEGRAPH COMPANY CANNOT BY CONTRACT RELIEVE ITSELF OF LIABILITY FOR NEGLIGENCE: See *Harkness v. Western Union Tel. Co.*, ante, p. 672, and note. In *Western Union Tel. Co. v. Howell*, 38 Kan. 685, the main features of the case were similar to those of the principal case, and the doctrine that a telegraph company has no power to limit its liability by contract, so as to relieve itself against acts of gross negligence committed by its agents and employees, was reiterated and affirmed. In this case the word "Salina" appeared in the message delivered instead of the word "Salem," written by the sender; and it was found as a fact that the word "Salem" was so plainly written that it could not have been mistaken for the word "Salina," nor for any other word, "by any person possessing ordinary eyesight, who would examine it with the slightest care"; and the court held that this was equivalent to a finding that the company's agent did not exercise the slightest care in transmission of the message. The additional fact also appeared that the manager of the firm to whom the message was sent feared a mistake, and had the agent of the company ask for a verification of the message; and it was decided that this was notice to the company that a mistake was feared, and that, in view of all the facts, the company was guilty of gross negligence.

BURDEN OF PROOF IS ON TELEGRAPH COMPANY TO EXPLAIN MISTAKES IN TELEGRAMS: See *Harkness v. Western Union Tel. Co.*, ante, p. 672, and note.

ATCHISON STREET-RAILWAY COMPANY v. NAVE.

[38 KANSAS, 744.]

NUISANCE. — SEVERAL PERSONS MAY UNITE AS PLAINTIFFS, although they are the owners of different but adjacent lots and buildings, to restrain the building of a street-railroad not authorized by the city, where such threatened injury or nuisance is common to all, and the injury would be special and peculiar to the plaintiffs, independent of and different from the general injury to the public.

FORFEITURE OF PRIVILEGE TO CONSTRUCT STREET-RAILWAY — SUCH PRIVILEGE A LICENSE — RENEWAL NECESSARY. — If privilege of occupying street and building railway is conferred by municipality for a limited time, when that time expires the privilege no longer exists. Such consent is a mere license, and until it is availed of, no contractual obligation or relation arises which requires a judicial declaration of forfeiture. After the time limit expires, renewal of the privilege is necessary to permit the company to occupy the streets and build its road.

JOINT action by three plaintiffs to restrain the defendant company from building a street-railroad. The plaintiffs were the owners of two buildings upon the street through which the road was to be constructed. These buildings adjoined each other, and were specially erected with a view to carry on the wholesale grocery business. It was also found as a fact that there was no access to said buildings from the rear, and the loading and unloading of merchandise would of necessity be done in front of the buildings. A track for steam-

cars extended through the street beyond a point opposite the stores; between this track and the curbing in front of the stores it was proposed to lay the street-car track. If this were done, there would not be sufficient space at that point to allow the coaches on the railroad and the street-cars to pass each other with safety to the passengers, and no space would be allowed in which to handle baggage from the steam-cars on that side of the track; and it would be a source of public danger to permit the street-car track to be so near the other track. Because of the limited space, and the facts above stated, the laying of the street-car track would seriously impede the transaction of the plaintiff's business. The case was tried without a jury, and judgment was rendered restraining the defendant company from laying said track; from which judgment the case was brought to this court for review. The other necessary facts are stated in the opinion.

Jackson and Royce, for the plaintiff in error.

W. W. & W. F. Guthrie, for the defendants in error.

JOHNSTON, J. Two principal questions are brought up by this proceeding for our consideration and decision. The first relates to the objection of misjoinder, and arises on the order overruling the demurrer alleging that several causes of action and several parties plaintiff were improperly joined, and also in rendering a single judgment in favor of all the plaintiffs upon what are termed independent causes of action. It is argued that the obstruction of access to the Nave and McCord building, which was adjoining and north of the Moulton building, in no way affected the use of the latter, and that the threatened nuisance or obstruction to the Moulton building would not have been an interference with the use and enjoyment of the Nave and McCord property. As a general principle, several plaintiffs having distinct and independent causes of action against a defendant cannot unite in a suit for the separate relief of each. The code provides that where several persons have an interest in the subject of the action and in obtaining the relief demanded, they may join as plaintiffs: Sec. 35; and also: "When the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all": Sec. 38.

The threatened injury or nuisance complained of here is one that is common to all the plaintiffs, and all have a general interest in the relief demanded. In fact, the case falls fairly within the decision of *Palmer v. Waddell*, 22 Kan. 352. There the defendant erected an obstruction on a natural watercourse, causing the water to overflow and injure the land of the plaintiffs. Although the several plaintiffs were the owners of separate and distinct tracts of land, it was ruled that the overflow was a common injury to all the plaintiffs, and the common interest which they had authorized them to join in a suit as plaintiffs to restrain the nuisance. The same principle is announced in the case of *Jeffers v. Forbes*, 28 Id. 179, where it is said that the owners of different tracts of land may unite in a single action to abate a common nuisance.

The next point is, that the findings do not sustain the judgment that was rendered. That depends on whether the plaintiffs would suffer an injury special and peculiar to themselves by the threatened nuisance, and also whether the defendant railway company had any authority or right to construct a railroad in front of their premises. The findings of fact made by the court, which have been stated, and need no repetition, sufficiently show, we think, that the injury resulting from the obstruction of the street is one that is special and peculiar to the plaintiffs below, and independent of and different from the general injury to the public. The railway company, however, had no right to occupy the street or construct a railroad on the proposed route. While the fee of the streets is in the county, the control of the same, in the interest of the public, is placed in the city; and before street-railways can be built or operated, the privilege must be obtained from the city authorities: *Atchison Street-Railway Co. v. Missouri etc. R'y Co.*, 31 Kan. 667; 2 Dillon on Municipal Corporations, sec. 724. It appears that in December, 1881, the mayor and council of the city of Atchison, by ordinance, granted to the Atchison Street-Railway Company the right to build on the street in question, at any time within six months from the taking effect of the ordinance. It seems that this privilege was not used; and in May, 1882, another ordinance was passed by the mayor and council authorizing the company to occupy the street, and build its railway at any time within six months after the taking effect of that ordinance; and by both ordinances it was provided that, if the company was interrupted or hindered by an action at law or judicial proceedings, the time of such

hindrance or interruption should not be deemed a part of the period in which the company was allowed the privilege of constructing its road. The company did not avail itself of the privilege granted by either ordinance, and it was not hindered or prevented from so doing by any judicial or other proceeding. The case therefore stands, so far as the road in question is concerned, as if no authority to occupy the street had ever been granted to the company. The contention that the privilege granted by the ordinances remains until a forfeiture is declared is not sound. The permission conferred by the city council was for a limited time, and when that time expired the privilege no longer existed. The grant is not an irrevocable one, which continues indefinitely, to be accepted or rejected at the option of the company. The consent of the city council to occupy the street is a mere license, and until the company has availed itself of the license, no contractual obligation or relation arises which requires a judicial declaration of forfeiture. Until the license is accepted and used, no right vests in the railway company, and it may be revoked by the city council; and after the time within which it may be availed of expires, the license lapses, and no revocation is needed to terminate the same. The railway company or licensee cannot thereafter occupy the street, or build its road thereon, without a new permission from the city authorities: *G. C. R. R. Co. v. G. C. & S. R'y Co.*, 63 Tex. 529; *City of Detroit v. City R'y Co.*, 37 Mich. 558. As the railway company had no authority whatever to build the proposed road, some of the questions discussed become unimportant, so far as this controversy is concerned, and need not be determined here.

The judgment of the district court will be affirmed.

VALENTINE, J. Believing that the first proposition contained in the *syllabus*, and the corresponding portion of the opinion, come clearly within the principles enunciated by a majority of this court in the case of *Palmer v. Waddell*, 22 Kan. 352, I concur, although, as an original proposition, I think it is at least doubtful. As to the remainder of the *syllabus* and the opinion, I fully concur.

JOINDER OF PARTIES IN ACTION TO ABATE NUISANCE: See the note to *Tate v. Ohio etc. R. R. Co.*, 71 Am. Dec. 311-315.

NON-PERFORMANCE OF CONDITION IN GRANT OF FRANCHISE—WHETHER JUDICIAL ACT DECLARING FORFEITURE IS NECESSARY. — There is no doubt

but a corporation may forfeit its charter or franchises for misuser or non-user by a judicial act properly instituted declaring the forfeiture: *People v. Kingston etc. Road Co.*, 23 Wend. 193; 35 Am. Dec. 551, and note 562; *State v. Commercial Bank*, 13 Smedes & M. 539; 53 Am. Dec. 106; *Canal Co. v. Railroad Co.*, 4 Gill & J. 1; *People v. Manhattan*, 9 Wend. 351; *Penobscot etc. Corp. v. Lamson*, 16 Me. 224; *Commonwealth v. Commercial Bank of Penn.*, 28 Pa. St. 383. But the question involved in the principal case is much more limited, the point considered there being merely whether, where the grant of the franchise is made upon condition that the thing granted shall be performed within a specified or a reasonable time, a forfeiture takes place by the mere neglect to perform, or whether a judicial act declaring a forfeiture is necessary. It is a well-adjudicated rule of law that a mere failure to perform is not *ipso facto* a dissolution, nor an absolute nor instantaneous destruction of the corporate existence: *People v. President etc. Manhattan Co.*, 9 Wend. 351, 382; unless there is some express proviso in the legislative act creating the body corporate: See cases *post*. With this exception, a direct judicial proceeding instituted by the government alone, giving the corporation an opportunity to answer and be fully heard, is necessary: *Regents v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 72; *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71, 72; *Matter of Kings County Elevated R. R. Co.*, 105 N. Y. 97; *State v. Minnesota Cent. R'y Co.*, 36 Minn. 246; *New Jersey etc. R. R. Co. v. Long Branch Commissioners*, 39 N. J. L. 28; *Lehigh B. Co. v. Lehigh C. & N. Co.*, 4 Rawle, 9; 26 Am. Dec. 111; *Boston Glass Mfy. v. Langdon*, 24 Pick. 49; 35 Am. Dec. 292; *Moore v. Schoppert*, 22 W. Va. 282, 290; *Pearce v. Olney*, 20 Conn. 544; *Trustees of Vernon Soc. v. Hills*, 6 Cow. 23; 16 Am. Dec. 429; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 747, and note 755; *Heard v. Talbot*, 7 Gray, 113, 119, 120; *Pixley v. Roanoke Navigation Co.*, 75 Va. 320; *State v. Fourth N. H. T. Co.*, 15 N. H. 162; 41 Am. Dec. 690; *Arthur v. Commercial etc. Bank*, 9 Smedes & M. 394; 48 Am. Dec. 719; *State v. Real Estate Bank*, 5 Ark. 595; 41 Am. Dec. 109; *Slee v. Bloom*, 5 Johns. Ch. 366; *Terrett v. Taylor*, 9 Cranch, 51; *Crumph v. United States Mining Co.*, 7 Gratt. 352; *Connecticut etc. R. R. Co. v. Bailey*, 24 Vt. 465; *Selma etc. R. R. Co. v. Tipton*, 5 Ala. 805; *Bohannon v. Binns*, 31 Miss. 355; *Smith v. Plank Road Co.*, 30 Ala. 650; *Myers v. Manhattan Bank*, 20 Ohio, 283; *Bank of Missouri v. Merchants' Bank of Baltimore*, 10 Mo. 123; *Atchafalaya Bank v. Dawson*, 13 La. 497; and the only competent evidence to prove a forfeiture is the judgment of a court directly on the point: *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325; 94 Am. Dec. 84; *Trustees etc. v. Hills*, 6 Cow. 23; 16 Am. Dec. 429; and the corporation itself is a necessary party to a bill to declare a forfeiture of its franchises, or to divest it of any of its property or rights: *Mickles v. Rochester City Bank*, 11 Paige, 118; 42 Am. Dec. 103; and such forfeitures must be judicially declared before the same franchise can be granted to others: *Regents v. Williams*, 9 Gill & J. 365; 31 Am. Dec. 72.

It has been declared that a distinction exists in cases of the exercise of corporate rights as provided by charter and those where the charter having been granted, an exercise of a privilege, such as laying a track in a certain street of a city, is obtained by a chartered corporation. In considering the points involved in this question, it is well to bear in mind that to be a corporation is itself a franchise: *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325; 94 Am. Dec. 84; also that acts granting franchises and charters are contracts when granted to private civil corporations: *Davis v. Gray*, 16 Wall. 203; *State v. Real Estate Bank*, 5 Ark. 595; 41 Am. Dec. 109; *People v. Manhattan Co.*, 9

Wend. 351; *Claghorne v. Cullen*, 13 Pa. St. 133; *State v. Noyes*, 47 Me. 189; *Society etc. v. New Haven*, 8 Wheat. 464; *Trustees v. Indiana*, 14 How. 268; *Providence Bank v. Billings*, 4 Pet. 460; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210. In addition, "a distinction must be observed between words limiting the existence of a corporation until the happening of a prescribed event, and a provision making the happening of an event a cause for declaring a forfeiture of the charter upon condition subsequent. In the former case the charter will expire by itself of its own limitation, but in the latter case a judicial determination of the ground of forfeiture is required": Morawetz on Corporations, sec. 1006. While it is true that a judicial forfeiture is necessary in case of a charter, yet it is held that the consent of a city council to the occupation of its streets by a railroad company is not a grant in the nature of a contract, but a mere license "extended to the company so as to secure facilities for the accommodation and convenience of the citizens," and that "until the company has availed itself of the license, the city council may at any time withdraw its consent," and that therefore it is not necessary to procure a judicial declaration of forfeiture: *G. C. R. R. Co. v. G. C. S. R'y Co.*, 63 Tex. 529; and this argument was followed in the principal case. It is also held in *Chicago etc. R'y Co. v. Story*, 73 Ill. 541, that where a company by grant from the legislature has the right to construct and maintain a railroad within a city, upon such conditions as the city council should authorize, the grant given by ordinance was a mere license, and was not a franchise in any sense of the word; and where a railroad company was by a city ordinance granted permission to lay its road-bed and build its road, with the express proviso that it should be done within one year, and the company, by reason of injunctions and the interference of the city's officers, acting under the mayor's directions, was prevented from performing said condition, and it appeared that had it not been for such interference the road would have been completed within the time limited, it was decided that the company's right to lay its track was not lost; and it was held that the proviso was a grant of license with a condition subsequent, since "it was evidently the design of the parties that the license should vest at once, so that the company might proceed immediately to perform the condition, . . . and the license would be liable to be defeated by failure, without excuse to perform the condition": *City of Chicago v. Chicago etc. R. R. Co.*, 105 Ill. 73, 78. Although where the time is limited within which, after the act of incorporation is granted, the franchise is to be exercised, it has been held that such proviso is not a condition precedent, but a defeasance: *People v. President etc. Manhattan Co.*, 9 Wend. 351. But notwithstanding the above cases, in *Hovelman v. Kansas City etc. R. R. Co.*, 79 Mo. 632, where the common council granted a right of way over certain city streets to a company chartered to build a horse-railroad, upon condition in its ordinance that said company should have the road completed within twelve months from the acceptance by it of the provisions of the ordinance, it was decided that "the condition to complete within a given time is one of those distinguished in law as conditions subsequent," and that the omission to perform the condition "does not *ipso facto* determine the estate, but exposes it to be determined at the election of the grantor"; and it was also held, in opposition to the doctrine declared in the Illinois case of *Chicago etc. R'y Co. v. Story*, *supra*, that such grant was a contract, and that the rights vested thereunder could not thereafter be impaired by the legislature by an amendment of the city charter. A very substantial distinction exists between the effect of a forfeiture at common law and a forfeiture declared by statute.

The former does not divest the title of the owner until established and enforced by a proper judgment. But a forfeiture declared by a statute immediately vests in the state the title to the franchise forfeited, "upon the happening of the event for which the forfeiture is declared, or at such other time and upon such other condition as the statute may name": *Upham v. Hosking*, 62 Cal. 257; *United States v. Grundy*, 3 Cranch, 151; *Kennedy v. Strong*, 14 Johns. 129. A corporation was granted the right to construct and operate a railway in the streets of a city, but the work was to be commenced within six months, and completed within five years, otherwise the franchise and privileges were to cease and be forfeited. The work was not commenced nor completed within the times specified. Thereafter the right to use the street for like purposes was granted to another corporation; and a contest arising between the two corporations, the former was held to have forfeited its franchise: *O. R. R. Co. v. B. & F. V. R. R. Co.*, 45 Cal. 373.

Where there is a proviso that certain conditions shall be fulfilled, with a reservation of power to repeal in case they are not performed, there may be a repeal without a previous judicial declaration of failure of the conditions: *Myrick v. Brawley*, 33 Minn. 377. So the charter of a banking corporation which provides "that if the corporation shall fail to go into operation, or shall abuse or misuse their privileges under this charter, it shall be in the power of the legislative assembly at any time to annul, vacate, and make void this charter," may be repealed by the legislature, without any judicial proceeding or prior notice to the corporation: *Miners' Bank v. United States*, Morris, 482; 43 Am. Dec. 115. In *New York etc. R. R. Co. v. Boston etc. R. R. Co.*, 36 Conn. 196, the grant to a railroad corporation contained the provision that "if said corporation shall not within twelve months from the rising of this general assembly procure and pay for its right of way over all land . . . upon which said road has been or shall be with the written approbation of the railroad commissioners located," or make satisfactory arrangement within that time with the several land-owners for said right of way, that then such written acceptance of the commissioners "to the location of said railroad within said twelvemonth upon and over said lands should be void." Substantially the same provision as to a time limit was also made by the general law of the state. The company acquired no title to the land, or to a right of way over the same, as provided by the statute and private act, within the time limited, except over a portion of the road. It was decided that a judgment declaring a forfeiture was not necessary, and that by the failure to act within the time limited, the acceptance became of no effect at the expiration of the time named in the statute. To the same effect is the case of *Matter of Brooklyn etc. R. R. Co.*, 72 N. Y. 245; 75 Id. 335; 81 Id. 69; followed in *Matter of Kings County Elevated R'y Co.*, 41 Hun, 426, where a time was limited within which the franchise was to be exercised, and the public statute also prescribed certain conditions to be performed, and it was said that "it needed no action or judicial procedure to declare or complete a forfeiture of the charter and loss of corporate powers"; but the statutory declaration was, that in case of non-performance of the conditions by a company, "its corporate existence and power should cease." The court, in passing upon a like question in a later New York case, declared that "the general principle is not disputed that a corporation, by omitting to perform a duty imposed by its charter or to comply with its provisions, does not *ipso facto* lose its corporate character or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court in an action instituted for that pur-

pose by the attorney-general in behalf of the people; but"—and this expresses the reason underlying these decisions—"it cannot be denied that the legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts, by any omission or violation of its charter or default as to limitations imposed; and whether the legislature has intended so to provide in any case, depends upon the construction of the language used"; and where the continued existence of the corporation is made to depend upon compliance with the requirements of the act under which it came into being, then non-compliance terminates the corporate existence *ipso facto*: *Brooklyn S. T. Co. v. City of Brooklyn*, 78 N. Y. 524, 529; see also *Green v. Green*, 34 Ill. 320; *Oakland R. R. Co. v. Oakland etc. R. R. Co.*, 45 Cal. 365. In the last case it is said that in such cases of limitations fixed by the legislative grant, "'the forfeiture takes place on the commission of the act prohibited, and by the forfeiture, the property is immediately divested out of the owner before any seizure or suit': *Kennedy v. Strong*, 14 Johns. 129"; and also that an omission to act as provided works a complete forfeiture. See *Omnibus R. R. Co. v. Baldwin*, 57 Cal. 160, where it is held that section 502 of the Civil Code of California "does not declare that a failure to comply with the provision which requires work to be commenced within one year works a forfeiture, but that a failure to comply with that and the provision which requires that it shall be completed within three years works a forfeiture, and even then it is optional with the authorities granting the right of way whether the forfeiture shall be total or partial." It was also declared in *Toledo etc. R. R. Co. v. Johnson*, 49 Mich. 148, 151, that "a failure to finish the road and put it in full operation within the time specified renders void the act of incorporation, in so far as it applies to the unfinished portion," but that the statute limiting the time within which the conditions imposed must be performed should definitely fix such time.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

HEGENMYER v. MARKS.

[87 MINNESOTA, 6.]

AGENCY. — AGENT AUTHORIZED BY PRINCIPAL TO SELL LATTER'S LAND FOR SPECIFIED NET SUM, and to receive for his services all above that sum for which he might sell, is bound to disclose to his principal a fact in the condition of the land increasing its value which he afterwards learns, and of which his principal was ignorant when he fixed the price; and a sale by him on the basis of the sum fixed, without giving such information, is a fraud. And the purchaser being cognizant of the fraud, the principal, in order to rescind the sale, need tender a return of only what he received, and need not include in the tender what the agent received and retained.

ACTION to rescind sale and conveyance of land. The facts appear in the opinion.

Fish and Evans, and J. C. Worrall, for the appellant.

M. H. Sessions, for the respondent.

GILFILLAN, C. J. The plaintiff owned a lot of land in Minneapolis. One Creigh was a real estate broker, and at his request she employed and authorized him to sell the lot to any one who would purchase it at such sum as would net her \$1,050, Creigh to receive as his compensation whatever he could get for the lot in excess of \$1,050. At the time of such employing, he (believing it to be true) represented to her, and she believed, that \$1,050 was the fair market value of the lot. Both of them supposed the lot to be entirely vacant; but a third person, owning the adjoining lot, had by mistake constructed on her lot, thinking it was his, a valuable house and

barn, in such manner that they were part of the realty. Neither plaintiff nor Creigh knew anything of this at the time of the employing. With the buildings, the lot was worth over \$3,000. Creigh learned of it before making a sale, but did not disclose it to plaintiff. He sold the lot to defendant for \$1,150, the latter knowing of the buildings on the lot, and knowing that Creigh knew, and that plaintiff was ignorant, of the fact. Of the \$1,150, \$450 was paid in cash,—plaintiff receiving \$350 and Creigh \$100,—and \$700 was secured by defendant's note to plaintiff and his mortgage on the lot. Upon learning of the facts, plaintiff tendered to defendant the \$350, with interest, and the note and mortgage, and demanded a reconveyance of the lot, which defendant refused. The action is to rescind the sale and conveyance. The court below decided in favor of plaintiff.

The decision of the court below proceeds on the propositions: 1. That it was the duty of Creigh, upon learning of the buildings being upon the lot, to communicate that fact to plaintiff, and that by selling the lot without disclosing that fact, at a price which he knew she had put upon it in ignorance of that fact, he committed a fraud upon her; and 2. That defendant, by purchasing with notice of Creigh's fraud, became a party to it. If the first proposition be correct, the second follows as a necessary consequence.

The case turns upon whether it was the duty of Creigh, before making a sale, to disclose what he had learned to his principal. Upon this contract of agency, my brethren are of opinion (though it is not mine) that when Creigh learned a fact affecting the value of the property, and of which fact he knew she was ignorant when she fixed the price, and if he had reason to believe that had she known the fact she would have fixed a higher price (as in this case she undoubtedly would), then good faith towards his principal required of him, and it was his legal duty, to disclose the fact to her before he proceeded to sell, so that she might, if so disposed, fix the selling price in accordance with the actual condition of things. This being so, his selling upon the basis of the price first fixed, without disclosing to her the fact he had learned, was of course a fraud on her.

The tender was sufficient. Defendant and Creigh were parties to the fraud on plaintiff, by which Creigh, one of the parties, received (in effect) from defendant, the other party to it, one hundred dollars. No consideration of equity or

morality would require of plaintiff to make that good either to Creigh or defendant. All that can be required of her as a condition of her repudiating the transaction imposed on her by the fraud of Creigh and defendant is to restore what (in ignorance of the facts) she received in the transaction.

Judgment affirmed.

AGENT FOR SALE OF REAL PROPERTY IS BOUND TO ACT IN GOOD FAITH towards his principal, and can neither act for both parties without agreement, nor retain any benefit to himself without knowledge of his principal: See the note to *Walker v. Osgood*, 93 Am. Dec. 171 et seq.; and if the agent has acted fraudulently and in collusion with the purchaser, the principal may rescind the sale by tendering back the money received: *Miller v. Louisville & N. R. R. Co.*, 3 Am. St. Rep. 722.

GILFILLAN v. CHATTERTON.

[87 MINNESOTA, 11.]

TAXATION.—PROPER CERTIFICATE OF SALE IS ESSENTIAL TO COMPLETE SALE OF LAND FOR TAXES, and such certificate must be executed at the time of the sale, or within such time thereafter as may be reasonably necessary for the purpose; and one not executed until years after the sale is of no effect.

EJECTMENT. The opinion states the case.

D. A. Secombe, for the appellant.

Gilfillan, Belden, and Willard, for the respondent.

GILFILLAN, C. J. To show title to the land in dispute out of plaintiff and in himself, defendant relied on a certificate executed June 14, 1886, by F. S. McDonald, then auditor of Hennepin County, certifying to the sale of the land on January 2, 1875, under a judgment for delinquent taxes entered September 1, 1874. The certificate was in the usual form of a certificate of sale under a tax judgment. At the time of the supposed sale, Jacob Schaefer was auditor of the county. A certificate had been issued by him at the time of the sale, but it was held void by this court in *Gilfillan v. Hobart*, 35 Minn. 185.

As decided in *Stewart v. Minnesota etc. R'y Co.*, 36 Minn. 355, McDonald had no authority to execute the certificate, and it was therefore of no effect. As indicated in the opinion in that case, the certificate is a part of and is essential to the sale. There cannot be a completed sale without it. Where

there is a long list of lands exposed to sale, the auditor need not make the certificate, as to each piece, as soon as it is struck off, and before he offers the next piece for sale, but he may go on until all have been offered and struck off, and then complete the sale, as to each, by executing the proper certificate; and he may execute the certificate within such time as may be reasonably necessary to strike off all the pieces on the list, and prepare and execute the certificates. In no case that we can conceive of could several years be regarded as such reasonably necessary time.

Order affirmed.

CITY OF ST. PAUL v. DOW.

[37 MINNESOTA, 20.]

MUNICIPAL CORPORATION WHICH IS AUTHORIZED TO REGULATE ANY GIVEN SUBJECT, and to require those who do any act to obtain a license or permit therefor, may charge the person procuring it a reasonable fee to cover the labor and expense attending the issue of such license or permit, although the power to do so is not expressly given in the charter. This fee is not a tax, nor its exaction an exercise of the taxing power.

ID. — AMOUNT OF FEE CHARGED BY MUNICIPAL CORPORATION FOR "BUILDING PERMIT" may be graduated according to the estimated cost of the building.

Olivier and Farwell, for the appellant.

W. P. Murray, for the respondent.

MITCHELL, J. The common council of the city of St. Paul have power to control and regulate the construction of buildings, and to prevent and prohibit the erection and maintenance of any insecure or unsafe buildings within the city. They have also the power to provide for the appointment of a person to inspect and supervise the construction of buildings: City Charter, Municipal Code St. Paul, sec. 79, subs. 37, 38. In the exercise of these powers, the council passed "An ordinance to regulate the construction and plumbing of buildings within the city of St. Paul, and to appoint a building inspector," by which, among other things, they provided for the appointment of a building inspector, and required every person desirous of erecting a building to apply to the building inspector "for a permit for the purpose," and to furnish him with a written statement of the proposed location, dimensions, and manner of construction, and the materials to be used, and a plan of the plumbing, draining, and ventilation, together with the

plans and specifications of the proposed building, which shall be delivered to and remain with the inspector a sufficient time to allow the necessary examination of the same; after which, if it shall appear to the inspector that the laws and ordinances of the city are complied with, he shall give the permit asked for, upon the payment of a prescribed fee, the amount of which is graduated according to the "estimated cost" of the proposed building, viz.: 50 cents for a building the estimated cost of which is not over \$100; over \$100, and not exceeding \$1,000, \$1; over \$1,000, and not exceeding \$1,500, \$2.50; over \$1,500, and not exceeding \$2,500, \$4; for \$2,500 up to \$5,000, \$5; and for every \$1,000 over \$5,000, an additional sum of fifty cents.

Blank forms for the detailed statement required by the ordinance are to be furnished to the applicant at the office of the inspector, which when properly filled up are to be signed by the applicant, and returned to the inspector, with an agreement that the building will be constructed according to the statement and the ordinances of the city. It is declared unlawful to construct a building without a permit, and a penalty is imposed for so doing. The inspector is required to keep a record of all permits issued, and a register of the number, size, etc., of all buildings erected. It is also made his duty to inspect, from time to time, all buildings in process of erection, to see that the foundations are secure and adequate; that the building is being erected according to the provisions of the ordinance; that the materials are suitable for the purpose, and of sufficient strength and solidity to answer the purpose for which the building is designed, etc. When the building is completed, the inspector is required, on application, to give the owner a certificate that the building is in all respects conformable to law, and properly constructed. No other fee is required of the owner except the fee for the permit already referred to.

The appellant, who was convicted in the court below of erecting a building without a permit, attacks the validity of this ordinance. The power of the common council to pass ordinances regulating the erection of buildings is not questioned. That the provisions of this ordinance for that purpose (except that requiring payment of a fee for the permit) are reasonable and valid, is not disputed. But it is contended that the provision requiring the payment of a fee for a license or permit to build is unauthorized and invalid. No express authority to charge a fee for a building permit is found in the

charter; but we think that whenever, as in this case, a municipal corporation is authorized to regulate a given subject, and require those who do any act, or transact any business, to obtain a license or permit therefor, a reasonable fee for the license or permit, and the labor or expense attending its issue, may be properly charged to the person procuring it, although the power to do so is not expressly given in the charter. This is not a tax, nor its exaction an exercise of the taxing power. It is simply a reasonable sum, collected of the party interested for the purpose of defraying, in part at least, the necessary expense attending the granting of the permit: *Dillon on Municipal Corporations*, secs. 357, 358; *Welch v. Hotchkiss*, 39 Conn. 140. Therefore the objections raised by appellant, upon the theory that the fee is a tax, require no further notice.

Neither do we see any objection to this fee being graduated according to the estimated cost of the building. The fee is not exacted for the mere clerical act of issuing the permit. Its amount is evidently fixed with reference to the whole labor and expense connected with the matter, including the examination of the plans and specifications before the permit is issued, and the subsequent inspection of the building while in process of erection, and, finally, the issuing the certificate to the owner after its completion. That this would involve much more labor and expense in the case of a large building or block than in case of a small one, is self-evident, and while this labor might not be exactly in proportion to the cost of the structure, yet the cost probably furnishes the best practicable general standard by which to estimate it. The ordinance is not explicit as to who is to estimate the cost of the proposed building. The counsel for appellant assumes that this is to be done by the building inspector, and from this argues that the ordinance places an arbitrary and unauthorized power in his hands, which might prove a source of great oppression. If counsel's construction of the ordinance in this respect be correct, his objection would be a serious one.

But we think that the ordinance contemplates that, in his statement, the applicant shall furnish the inspector with the means of ascertaining and determining every fact necessary to be determined in connection with the issuing a permit, included in which should be an estimate of the cost of the proposed building; and that this estimate, thus furnished, is the basis upon which the amount of the fee for the permit is to be

computed, and is conclusive upon this point at least, unless it is fraudulent.

The subject of the ordinance is sufficiently expressed in its title.

Judgment affirmed.

POWER OF MUNICIPAL CORPORATIONS TO PASS ORDINANCES, GENERALLY: See the extended note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 627-643; and see particularly, as to power to license, *Id.* 638; and note to *Ex parte Gregory*, 54 Am. Rep. 528; *St. Paul v. Colter*, 90 Am. Dec. 278. An ordinance requiring a building license and imposing a license fee was held valid in *Welch v. Hotchkiss*, 12 Am. Rep. 383.

MAURIN v. FOGELBERG.

[87 MINNESOTA, 23.]

STATUTE OF FRAUDS.—**VERBAL DIRECTION AS FOLLOWS:** "You give all the goods to H. and R. that they want, and charge directly to them, and every first of the month you bring in the bill, and I will pay it," uncontrolled and unqualified by other circumstances, imports on its face an original, and not a collateral, promise, implying that the credit was to be given exclusively to the promisor, although the goods were to be delivered to H. and R., and is not therefore within the statute of frauds.

ACTION for goods sold and delivered. The facts appear in the opinion.

Rawson and Houpt, for the appellant.

M. R. Tyler, for the respondents.

MITCHELL, J. This is an action to recover for goods alleged to have been sold to defendant, and, at his instance, delivered to Harris and Rogers. Defendant was a contractor in the construction of the Northern Pacific railroad, and Harris and Rogers were subcontractors under him. Defendant gave to plaintiffs the following verbal direction: "You give all the goods to Harris and Rogers that they want, and charge directly to them, and every first of the month you bring in the bill, and I will pay it." In pursuance of this, plaintiffs delivered to Harris and Rogers the goods sued for. The principal question in the case is, whether this was a special promise to pay the debt of another, within the meaning of the statute of frauds. In our opinion, this expression, uncontrolled and unqualified by circumstances, imports on its face an original, and not a collateral, promise, and implies that the

credit was to be given exclusively to the promisor as purchaser, although the goods are to be delivered to a third person: See *Cole v. Hutchinson*, 34 Minn. 410; *Grant v. Wolf*, 34 Id. 32.

This would be clearly so if the direction to charge the goods to Harris and Rogers had been omitted. But this direction does not necessarily imply that any credit was to be given to Harris and Rogers. The object of it might have been, and probably was, merely to enable defendant to keep his accounts with Harris and Rogers. For that purpose he would naturally desire the account for goods furnished them to show to whom the goods were furnished, and to be kept separate from any other account plaintiffs might have against him. There is no evidence in the case tending to show that plaintiffs ever attempted to collect this account from Harris and Rogers. Nothing of the kind can be spelled out of a mere incidental reference by Peter Maurin, in his testimony, to an "attachment on these parties." If this refers to a suit by plaintiffs against Harris and Rogers, it does not appear that it was on this claim. Hence the argument of defendant, predicated upon that fact, that some credit must have been given to Harris and Rogers, has no foundation on which to rest. Therefore the defendant certainly had no reason to complain of the action of the court in submitting to the jury the question to whom the credit was given as one of fact, to be determined from the evidence. It was at least sufficiently favorable to him.

After the defendant had directed plaintiffs, as before stated, to give Harris and Rogers all the goods they wanted, plaintiffs said to him, "You will have to give an order to that effect," which defendant promised to do, but in fact never did. This was no part of the contract. It was merely a request by plaintiffs, for their own protection, that the order to deliver goods to Harris and Rogers be reduced to writing. Hence the court was correct in telling the jury that "it cut no figure in the case."

Order affirmed.

WHAT ARE COLLATERAL AND ORIGINAL UNDERTAKINGS WITHIN THE STATUTE OF FRAUDS is fully discussed in the note to *Packer v. Benton*, 95 Am. Dec. 252 et seq.

BENSON v. MARKOE.

[87 MINNESOTA, 30.]

MISTAKE. — POWER OF COURTS OF EQUITY TO AFFORD RELIEF FROM THE CONSEQUENCES OF MUTUAL MISTAKES of parties to written instruments is not strictly limited to mistakes of fact, but extends also to mistakes of law. If nothing more than the bare mistake of law alone be shown as a reason for relief, it will rarely, if ever, be granted; yet equity will interfere where it further appears that the defendant, availing himself of the opportunities afforded by the mistake, will take an unconscionable advantage, without consideration, the plaintiff being blameless, and the defendant being in no position entitling him to equitable protection.

1D. — ONLY VERY CLEAR AND CONVINCING PROOFS WILL BE SUFFICIENT TO OVERCOME PRESUMPTION that the written instruments which parties have executed for the purpose of evidencing and carrying into effect their agreements are, in legal effect or in terms, contrary to their intention.

1D. — IN GENERAL, MISTAKE OF ONE PARTY ONLY TO INSTRUMENT DOES NOT JUSTIFY REFORMATION OF IT, so as to subject the other party to obligations which he never intended to assume, or to bind him to do or to receive what he never contracted for or contemplated. But relief may be granted in such case of mistake, when the parties can be replaced in their former position.

James B. Beals and Ralston J. Markoe, for the appellant.

W. J. Rodgers and H. J. Horn, for the respondent.

DICKINSON, J. This is a demurrer to the complaint. It appears from the complaint that in 1883 the plaintiff, being the owner of several lots in a certain block of land in the village of White Bear, sold and conveyed them to William F. Markoe, a son of the defendant, designating the property conveyed by giving the numbers of the lots and block according to the recorded plat. The plaintiff took back a mortgage upon the same property to secure the payment of the purchase price, a sum of about twelve thousand dollars, which was recorded. In 1885 the grantee "applied to this plaintiff to make, execute, and deliver . . . a deed of quitclaim and release of said mortgaged premises, and then and there alleged, as a reason for such request," that the block contained a surplus of land exceeding the area specified in the plat, and that the proper proportion of this, justly pertaining to the lots described, had not been conveyed by the deed. The plaintiff, "relying upon said representations, and believing the same to be true," made, executed, and delivered to his former grantee a deed of release and quitclaim, whereby the plaintiff, for the acknowledged consideration of five dollars, granted, released,

and quitclaimed to his former grantee the premises described in the mortgage, which deed was recorded. It is alleged that this was without any consideration, and that the plaintiff never intended thereby to release or discharge the mortgage. After this, the plaintiff's grantee, who is alleged to be insolvent, conveyed the premises to this defendant, who took the same with full notice and knowledge of these facts, and the defendant now claims to own the premises discharged of the lien of the mortgage.

The legal effect of the release and quitclaim to the mortgagor was to discharge the mortgage: *Gille v. Hunt*, 35 Minn. 357. The question is, whether relief can be had in equity upon the ground of the mistake.

It is argued that even if the complaint be construed as showing that it was not the intention of either the grantor or grantee that the mortgage should be discharged, but that the mutual intention was only to convey land not conveyed by the former deed, yet equity will afford no relief, because the mistake of the parties as to the legal effect of the instrument was a mistake of law, and for this there is no relief.

It is a general rule, recognized in equity as well as at law, that mere mistakes of law, unattended by other circumstances affecting the case, do not afford ground for relief; but it is not a rule of universal application that equity will not hear parties to allege a mistake as to the law, or afford relief for its consequences.

In *Canedy v. Marcy*, 13 Gray, 373, an oral contract had been made by the plaintiffs, who had inherited certain real estate subject to a widow's dower, to sell two thirds of the premises, it not being intended to include the reversionary interest of the heirs in the one third which might be set off to the widow as dower. By mistake, deeds were drawn in such terms as to convey also this reversionary interest of the plaintiffs. The terms of the deeds were such as were intended to be employed, but both the scrivener who drew them, and the grantors, and, as it seems, the grantee as well, were mistaken as to the legal effect of those terms, supposing that they were only effectual to convey two thirds of the premises. The grantee did not claim any greater estate; but he having reconveyed to the defendant, the latter asserted title to the whole estate. Equitable relief being sought in this action, it was allowed, Shaw, C. J., saying: "We are of opinion that courts of equity in such cases are not limited to affording

relief only in case of mistake of fact, and that a mistake in the legal effect of a description in a deed, or in the use of technical language, may be relieved against upon proper proof."

Stedwell v. Anderson, 21 Conn. 139, was a case where several sisters, owning land jointly, attempted, with their respective husbands, to make partition by deed. One of the husbands, who drew the deeds, by mistake and ignorance as to the proper form, made the husbands grantees with their wives, thus conveying a fee to the husbands, contrary to the intention of the parties. In this action, many years afterwards, relief was afforded, the court saying: "When property has been conveyed through mistake, by deed, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee in good conscience has no right to retain, a court of chancery will interfere, and correct that mistake, whether it arose from a misapprehension of the facts, or of the legal operation of the deed."

In *Cooke v. Husbands*, 11 Md. 492, a deed was executed which, by mistake of the draughtsman as to its legal effect, conveyed a greater interest than was intended by the parties. Relief was granted.

Clayton v. Freet, 10 Ohio St. 544, was for the correction of a deed. The parties were shown to have intended the conveyance to be of lands to a wife for life, with remainder to her children. By ignorance and mistake the deed was made conveying the premises to the wife and to her heirs, the parties supposing such a deed would have the desired effect. Relief was granted, although the mistake was one of law.

A similar case was presented in *Evants v. Strode*, 11 Ohio, 480, 38 Am. Dec. 744, and the same principle declared. See also, to the same effect, *McNaughten v. Partridge*, 11 Ohio, 223; 38 Am. Dec. 731.

The same principle was involved in *Remington v. Higgins*, 54 Cal. 620, which supports the proposition that a mistake of law as well as of fact may afford ground of relief in equity. So in *McMillan v. New York Water Proof Paper Co.*, 29 N. J. Eq. 610, a mortgage by mistake drawn to certain individuals and their "successors," instead of to their heirs, was corrected. See, further, *Brown v. Lamphear*, 35 Vt. 252; *Larkins v. Biddle*, 21 Ala. 252; *Champlin v. Laytin*, 1 Edw. Ch. 467; *Green v. Morris and Essex R. Co.*, 12 N. J. Eq. 165; *Stover v. Poole*, 67

Me. 217, 223; *Worley v. Tuggle*, 4 Bush, 168; *Walden v. Skinner*, 101 U. S. 577; *Snell v. Insurance Co.*, 98 Id. 85; *Pitcher v. Hennessey*, 48 N. Y. 415, 424; *Baker v. Massey*, 50 Iowa, 399; *Underwood v. Brockman*, 4 Dana, 309; 29 Am. Dec. 407; *Willan v. Willan*, 16 Ves. 72; Pollock on Contracts, 393, 395, 450; Leake on Contracts, 345, 346; 2 Pomeroy's Eq. Jur., secs. 842-847.

A careful consideration of the authorities has led us to the conclusion that the power of courts of equity to afford relief from the consequences of the mutual mistakes of parties to written instruments is not strictly limited to cases of mistake of fact, but extends also to mistakes of law; and while, if nothing more than the bare mistake be shown as a reason for relief, it will rarely, if ever, be granted, yet equity will interfere where it further appears that the defendant, availing himself of the opportunities afforded by the mistake, will enforce an unconscionable advantage without consideration, the defendant being in no position entitling him to equitable protection, and the plaintiff not being blamable. But this jurisdiction will be exercised with caution, and only very clear and convincing proofs will be sufficient to overcome the presumption that the written instruments which parties have executed for the purpose of evidencing and carrying into effect their agreements are in legal effect or in terms contrary to their intention.

The case of *McKusick v. County of Washington*, 16 Minn. 151, did not involve any material mistake. The plaintiff, relying upon representations that the land would be permanently devoted to a specified purpose, conveyed the fee by an absolute deed, unqualified in terms, the legal effect of which the plaintiff knew. At least nothing was alleged to the contrary.

Neither did *First Nat. Bank of St. Paul v. National Marine Bank*, 20 Minn. 63, present any such question as that involved in this case. The question there was, whether a written contract of indorsement could be affected by a contemporaneous oral agreement that it should not have the effect which the law puts upon it. There was no mistake as to the legal effect of the written contract, but the very common case was presented of an attempt to vary the written agreement by parol. The court says: "Neither fraud, mistake, nor surprise in making the contract is alleged."

The rule ordinarily applicable in such cases is different when the question arises in a court of equity in a suit to avoid

or to reform a written instrument for mistake, surprise, or fraud.

In *Catlin v. Fletcher*, 9 Minn. 85, the plaintiff, a widow, sought to secure the cancellation of a mortgage given by herself and husband to the defendant, and to enjoin a foreclosure by the defendant. It appears from the complaint demurred to that the plaintiff's husband owed to the defendant the debt secured, and that Swift's liability was that of an indorser for Catlin's accommodation. The grounds upon which the plaintiff sought relief were, that she had been induced by the defendant to execute the mortgage by his stating to her that Swift would not indorse the new note unless a mortgage were given; that if she would execute the mortgage, he, the mortgagee, would not enforce it, but would collect the debt from Swift, the indorser; and further, that Swift could not touch the mortgaged property. The court, after stating that the complaint did not show that this last representation was untrue, adds: "But assuming that the statement was not true, it was not a misrepresentation of a material fact, but one in regard to the legal effect of the conveyance; and such misrepresentations will not avoid the instrument." This language, when read in view of the case then under consideration, is not necessarily opposed to our present conclusion. The mistake, if there was one, was not attended by such circumstances as would justify a court of equity to interfere in her favor. To have granted relief in that case because of the plaintiff's mistake as to Swift's power to avail himself of the mortgage, would have been to sanction conduct on the part of the plaintiff which was calculated to defraud Swift, whose indorsement she had knowingly assisted to procure by executing the mortgage which she afterwards sought to avoid. We do not understand that the court meant that equity would never relieve from a mistake of law.

Assuming, then, that relief may be afforded, although the consequences sought to be averted have resulted from mistake of law, the case here presented is a proper one for the exercise of such jurisdiction. We are still assuming that the mistake was mutual, and that the complaint shows this to have been the case. It falls within the somewhat common class of cases where, in attempting to carry into effect a prior agreement, as in *Canedy v. Marcy*, *supra*, the instrument executed, by reason of mistake of the parties as to its legal effect, fails to express their real intention. It is apparent, as we think, from the

complaint, that this deed of release and quitclaim was intended to complete the conveyance of the lands previously sold, and which were supposed not to have been effectually conveyed by the former deed. But we think that the existence of a prior agreement is not absolutely necessary as a condition to justify equitable relief. If, without any agreement having been made prior to the time of the execution of this instrument, the intention of the parties was, by the execution and delivery of this deed, to merely convey certain land, and if, by mutual mistake or ignorance of the law, terms were employed which had the legal effect, not merely to convey such land, but also to accomplish something entirely different, and relating to a different subject, to which their minds had not been directed, relief may be afforded.

The facts that the parties to this deed intended only to convey and to take certain land not included in the former deed; that the release of the mortgage upon the land which had been previously conveyed was not in their minds, nor a subject concerning which they were dealing, or to which this quitclaim deed was supposed to relate; that this deed was given wholly without consideration; and that to now allow it to have effect as a release of the mortgage, contrary to the intention of the parties to it, would be a surprise resulting in a most unconscionable advantage,—are enough to take the case out of the operation of the general rule that for mere mistakes of law, unaccompanied by other circumstances appealing to the equitable discretion of the court, relief will not be afforded.

We have considered the complaint as showing a mutual mistake by the parties to the deed; the respondent (the plaintiff) claiming that it so appears, and it seeming probable that it was intended so to allege the fact, and that in the further progress of the cause the case may so appear to be. It is not, however, so alleged, nor is it necessarily inferable from what is alleged, and we have to consider whether, the plaintiff alone being mistaken as to the effect of the deed, he may have relief in equity. The complaint does not allege fraud.

In general, the mistake of only one of the parties to an instrument does not justify a reformation of it so as to impose upon the other party thereby obligations which he never intended to assume, or to bind him to do or to receive what he never contracted for or contemplated. But while the instrument will not be reformed so as to effect such consequences, it may be rescinded or canceled for the mistake of one only of

the parties: *Diman v. Providence etc. R. R. Co.*, 5 R. I. 130; *Dulany v. Rogers*, 50 Md. 524; *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 491; *Harris v. Pepperell*, L. R. 5 Eq. 1; *Brown v. Lamphear*, 35 Vt. 252, 259. Of course this should not be done unless the parties can be replaced in their former position. This plaintiff appears to be entitled to such relief as shall, in effect, limit the operation of this deed to the conveyance of the premises intended. There having been no consideration for the release of the mortgage, no such release having been intended by the grantor, and the grantee having no equitable right to retain such an advantage, the complaint shows good cause for relief. This defendant, with full notice and knowledge of the plaintiff's equities, is in no better position to oppose the granting of a remedy than was his grantor.

Order affirmed.

MISTAKE OF LAW AS WELL AS OF FACT MAY BE RELIEVED AGAINST IN EQUITY: See *Allen v. Elder*, 2 Am. St. Rep. 63.

EVIDENCE TO JUSTIFY RELIEF ON GROUND OF MISTAKE must be clear, unequivocal, and decisive: *Allen v. Elder*, 2 Am. St. Rep. 63; but while this is the rule, relief will not necessarily be refused because the testimony is conflicting: *Hutchinson v. Ainsworth*, 2 Id. 823.

MISTAKE, TO BE RELIEVED AGAINST IN EQUITY, MUST HAVE BEEN MUTUAL: See note to *Sawyer v. Hovey*, 81 Am. Dec. 661.

MERRILL v. RESSLER.

[37 MINNESOTA, 82.]

ASSIGNMENTS FOR BENEFIT OF CREDITORS. — UNDER PROVISIONS OF MINNESOTA STATUTE, LAWS OF 1881, CHAPTER 148, RELATING to assignments for benefit of creditors, an assignee may avoid transfers and chattel mortgages of the assignor, which the latter's creditors could avoid.

MORTGAGES. — CHATTEL MORTGAGE IS TRANSFER OF TITLE AS SECURITY, and strictly, at law, must contain words of conveyance. But the courts are so strongly inclined to construe the agreements of parties to make them effectual, that no formal words of transfer are required to make an agreement operate as a mortgage. Although terms are used which would imply something else, yet if it is apparent that a mortgage was intended, the court will so construe it.

LD. — STIPULATION IN LEASE OF REALTY, RESERVING TO LESSOR a lien for the rent on the goods and chattels of the lessee placed on the demised premises, to be enforced on the non-payment of the rent, in the same manner as in case of a chattel mortgage, by taking possession of the property and selling it, is in effect a chattel mortgage, in such sense as to bring the lease within the provisions of the statute requiring chattel mortgages to be filed.

ACTION to recover rent due upon a lease, and to enforce a lien for the payment of the rent upon personal property in the possession of one of the defendants, as the assignee of the defendant Ressler. Other facts appear in the opinion.

Wilson and Bowers, for the appellant.

Gould and Snow, for the respondents.

GILFILLAN, C. J. January 17, 1884, plaintiffs rented to the defendant Ressler a store building in Winona, for two years from March 1, 1884, at the rent of seventy-five dollars per month. In the lease was the stipulation: "And it is also agreed and understood between the parties aforesaid that the party of the first part shall have a lien for the rent aforesaid upon all the goods and chattels of the party of the second part which are or may be placed upon the said demised premises, and such lien may be enforced, on the non-payment of the rent aforesaid, in the same manner as in case of a chattel mortgage, on default thereon, by taking possession of said property and selling the same at public sale after ten days' notice of such sale."

Ressler went into possession under the lease, and remained in possession during the term of the lease, and put in the store a stock of merchandise and other property, and the same remained in the store until they were taken into possession by defendant Choate. April 13, 1886, Ressler made to Choate, pursuant to the provisions of Laws of 1881, chapter 148, a general assignment of all his property for the benefit of all his creditors. Choate thereupon accepted the trust, duly qualified as assignee, and as such, took possession of the assigned property, including the stock of goods and other property in the store, and as such assignee purposes to dispose of the same in the execution of his trust. On March 1, 1886, there was due of rent, under the lease, \$375, which has not been paid. The assignee refused to pay it unless proved in the insolvency proceeding and *pro rata* with the other debts proved, and refused to recognize any lien therefor on the stock of merchandise and other property in the store. The lease was never filed as a chattel mortgage.

On this statement of the case arise two questions of law: 1. Can an assignee, under Laws of 1881, chapter 148, avoid transfers and chattel mortgages of the assignor which the latter's creditors can avoid? 2. Was the lease, so far as it gave

the lessors a lien on the personal property, in effect a chattel mortgage, in such sense as to bring it within the requirements, as to filing, of the General Statutes of 1878, chapter 39? We may say that the assignee alleges other grounds, besides failure to file, for avoiding the claim of plaintiffs; but in the view we take of the case in the matter of filing, it is unnecessary to speak of their effect.

The decision of this court in *Farmers' Loan and Trust Co. v. Minneapolis Engine and Machine Works*, 35 Minn. 543, is nearly decisive upon the first of these questions. That was the case of a receiver of an insolvent corporation, appointed under the General Statutes of 1878, chapter 76. We held that the receiver may avoid any transfers void as to creditors. The proceeding under chapter 76 is analogous to that under Laws of 1881, chapter 148. Its purpose is the same, to wit, to take the assets of the debtor applicable to payment of debts, and appropriate them to that purpose. But if there could be any doubt as to the power of a receiver under chapter 76 to avoid transfers void as to creditors, it could not exist as to the power of an assignee or receiver under chapter 148. Section 7 of that chapter makes applicable to assignees and receivers appointed under the chapter all laws of a general nature applicable to receivers and assignments not in conflict with the provisions of the chapter. This makes applicable the provisions of the General Statutes of 1878, chapter 41, section 27, which reads: "That in all cases of general assignments for the benefit of creditors, the assignee or assignees shall be considered as representing the rights and interests of the creditors of the debtor or debtors making the assignment, as against all transfers and conveyances of property which would be held to be fraudulent or void as to creditors, and shall have all the rights which such creditors would have to avoid such fraudulent conveyances and transfers."

This is conclusive of the right of the assignee to avoid such a claim as the plaintiffs make, if the creditors could have avoided it.

As to the second of the questions, there was no claim at all upon the property unless the stipulation in the lease was, in effect, a chattel mortgage. If it amounted only to a license or power to take possession and sell, and apply the proceeds to payment of the rents, not coupled with an interest in the property, it would not follow the property, but ceased to be effectual when Ressler's power to control and

dispose of the property ceased. It was not a common-law lien nor a pledge. The lien which the law in certain cases gives upon chattels is the right of detention till the party claiming it shall be reimbursed for expenditures or labor bestowed upon them: *Oakes v. Moore*, 24 Me. 214, 219; 41 Am. Dec. 379. When such right or lien is given, not by law, but by contract of the parties, it is a pledge or power. But in either case possession is essential to the creation and continuance of the lien, as much so in one case as in the other. The reason for requiring possession to sustain the lien is well stated by Kent: "If the lien was to follow the goods after they had been sold or delivered, the encumbrance would become excessively inconvenient to the freedom of trade and the safety of purchasers": 2 Kent's Com. 639. A chattel mortgage is a transfer of the title as security, and strictly, at law, must contain words of conveyance. But so strongly are courts inclined to so construe the agreements of parties as to make them effectual, that no formal words of transfer, and no particular form of instrument, are required to make an agreement operate as a mortgage. Even though terms are used which would imply something else, yet, if it is apparent that a mortgage was intended, the court will so construe it: *Atwater v. Mower*, 10 Vt. 75.

Among the cases in which the courts, some deciding according to the rules of law, and some according to the principles of equity jurisprudence, have held instruments to be chattel mortgages, though no words of transfer were used, are the following:—

Atwater v. Mower, *supra*, in which the instrument recited that the party (who retained the possession) "turned out and delivered to P. A. one white and red cow, which he may dispose of in fourteen days to satisfy an execution."

Coty v. Barnes, 20 Vt. 78. The party retaining possession, the words were, "turns out his black cow as security for said rent"; the court saying: "It cannot be supposed that the parties to this bill of sale designed that it should be inoperative, as it must have been if it is simply to be treated as a pledge of the cow."

In *Byrd v. Wilcox*, 8 Baxt. 65, in which (a bill of sale, both title and possession passing to the buyer) the seller retained, in terms, a lien for the price, with power to sell on default.

Dunning v. Stearns, 9 Barb. 630, was similar to *Byrd v. Wilcox*, *supra*.

In *Langdon v. Buel*, 9 Wend. 80, the instrument recited the giving of certain notes by the party executing it, and continued: "For securing the payment of said notes, I hereby pledge and give a lien on the said engine to said L., and in case the notes are not paid, hereby consent that L. shall hold the same as security, and to save himself harmless."

In *McLean v. Klein*, 3 Dill. 113, in a lease was a clause declaring that certain furniture "shall be subject to the payment of said rent reserved, and all unpaid rent shall be construed to be a mortgage lien on the same after the same becomes due and payable." The court held that, not being a legal mortgage, because wanting words of conveyance, it was an equitable one, or lien in the nature of one.

In *Harris v. Jones*, 83 N. C. 317, the words were: "Conveys a lien upon each and every of said crops."

In *Mervine v. White*, 50 Ala. 388, was used the word "mortgage" without any other word of conveyance.

In *Ellington v. Charleston*, 51 Ala. 166, the writing stated only: "We give said E. a lien on one horse Charley, to have and to hold until all the above advances are paid."

In *De Leon v. Higuera*, 15 Cal. 483: "We mortgage," with power to sell, if the debt should not be paid.

In *Whiting v. Eichelberger*, 16 Iowa, 422, in a lease the words were: "Said lessor is to have a lien on the same [furniture sold by him to the lessee] for the faithful performance of this obligation." The court said: "Equity will recognize and sustain it as a mortgage when it appears therefrom that it was so intended."

In this case there are no words of conveyance, but that the parties intended the clause to operate (and even to be enforced) in the same manner as a mortgage, is evident. They intended it to be operative, and it cannot operate in any other way. It is immaterial whether it is properly designated a legal mortgage or an equitable mortgage, for in either case it comes within the statute in reference to filing. The statute does not indicate any distinction, and either as much as the other is within the mischiefs which the statute seeks to prevent.

According to the allegations of the answer, the clause of the lease reserving a lien may be avoided by the assignee.

Order reversed.

ASSIGNEE FOR BENEFIT OF CREDITORS MAY SET ASIDE PRIOR FRAUDULENT TRANSFER BY HIS ASSIGNOR: *Pillsbury v. Kingon*, 36 Am. Rep. 556.

CHATTEL MORTGAGE TRANSFERS LEGAL TITLE AS SECURITY: *Tannahill v. Tuttle*, 61 Am. Dec. 480; *Bryant v. Carson R. L. Co.*, 93 Id. 403.

DEAKIN v. UNDERWOOD.

[37 MINNESOTA, 98.]

PLEADING. — **VARIANCE BETWEEN ALLEGATION AND PROOF IS NOT MATERIAL** unless it misleads the adverse party to his prejudice.

AGENCY. — **WHEN AUTHORITY AS AGENT IS CONFERRED UPON PARTNERSHIP, EACH PARTNER MAY EXECUTE**, and the act of one is the act of the firm, and in strict pursuance of the power.

Id. — **WHERE POWER TO EXECUTE CONTRACT IS GIVEN TO FIRM, PRINCIPAL IS BOUND**, although the member of the firm who signs the principal's name adds his own individual name, instead of the name of the firm, as agent. And if the agent simply fixed to the instrument the name of his principal alone, the latter would be effectually bound.

Id. — **AUTHORITY TO AGENT TO SELL LAND** for one half cash, and the other half "payable on or before one year," authorizes a sale for one half cash, and the other half "payable in one year," and the principal is bound thereby. In either case the vendor would be entitled to demand payment in one year, and not before.

VENDOR AND PURCHASER. — **IT IS INCUMBENT UPON OBLIGOR IN CONTRACT FOR SALE OF LAND**, who seeks to avoid performance under a provision in the contract authorizing him to declare it void "if the title cannot be made good," to prove affirmatively that fact. If the defect alleged is a sale of the land for taxes, it is incumbent upon him to prove that the period for redemption has expired.

John B. and W. H. Sanborn, for the appellant.

Uri L. Lamprey, for the respondent.

MITCHELL, J. This was an action to compel specific performance of a contract for the sale of real estate. Plaintiff alleges that the defendant made the contract by "by A. B. Wilgus, his duly authorized agent and attorney in fact." The contract is attached as an exhibit to the complaint, and is signed, "O. W. Underwood, by A. B. Wilgus, Agent."

1. It appears from the evidence that the authority to sell was given to the firm of A. B. Wilgus and Brother, a partnership composed of A. B. Wilgus and E. P. Wilgus. It is claimed that, upon this state of facts, there was a failure of proof. But the material allegation of the complaint was, that defendant had made this contract with plaintiff. It was not necessary to allege that it was made through an agent. It would have been enough to declare upon it generally as of the personal act of the principal. The substance of the issue was not whether defendant had made the contract through an agent, but whether he had made it at all. Hence it cannot be said that there was a failure of proof. The most that can be possibly claimed is, that there was a variance between

the allegation and proof, but which could not, in this case, have misled the defendant to his prejudice, and therefore is not material.

2. Defendant further contends that the authority to sell being to the firm of A. B. Wilgus and Brother, which was composed of two members, this authority could only be executed by the two jointly, and not by one separately, so as to bind the principal. In support of this contention, he invokes the well-known general rule of the common law, that where an authority to do an act is conferred upon two or more agents, the act is valid to bind the principal only when all of them concur in doing it; the power being joint, and not several: *Rollins v. Phelps*, 5 Minn. 463. Even where the authority is given to several agents, this rule is not so rigid and inflexible as to overcome the apparent intention of the parties to the contrary: Story on Agency, secs. 42, 43; *Hawley v. Keeler*, 53 N. Y. 114. But we think the rule has no application where the authority is given to a partnership as such. Each member of a partnership is the agent of the firm, and all the partners are jointly accountable for the acts of each other; and where a person appoints a partnership as his agent, he must be deemed to have done so with reference to these rules of law. When a person delegates authority to a firm, it is an appointment of the partnership as his agent, and not of the individual members as his several and separate agents. Hence each partner may execute, and the act of one is the act of the firm, and in strict pursuance of the power: *Gordon v. Buchanan*, 5 Yerg. 71.

But it is claimed that, conceding this, he must do it in the name of the firm, and that if, as in the present case, he uses his individual name, it is not the act of the partnership, and will not bind it. The defendant seems to overlook the fact that the contract is the act of the principal, and not of the agent, and that the party to be bound is the former, and not the latter. Hence the important question is, whether the principal's name has been signed to the contract by one having authority to do so. That in this case A. B. Wilgus, as a member of the firm of A. B. Wilgus and Brother, had, by virtue of the authority given the firm, power to execute this contract in the name of defendant, cannot be questioned, and it is wholly immaterial whether to that name he added "by A. B. Wilgus and Brother," or "by A. B. Wilgus," or nothing at all. An agent authorized to sign the name of his principal effectually

binds him by simply fixing to the instrument the name of his principal, as if it were his personal act. The particular form of the execution is not material, if it be done in the name of the principal, and by one having authority in fact to execute the instrument: *Berkey v. Judd*, 22 Minn. 287, 302; *First National Bank v. Loyhed*, 28 Id. 396; *Devinney v. Reynolds*, 1 Watts & S. 328; *Forsyth v. Day*, 41 Me. 382.

3. The authority to the firm was to sell for one half cash, and the other half payable on or before one year. They sold for one half cash, and the other half payable in one year. It is claimed that this was unauthorized, and therefore the principal not bound. The terms of the contract as executed, so far as they affect the rights of defendant, were in legal effect the same as those authorized. By each he would be entitled to demand payment in one year, and not before. The distinction between this case and one where the facts are exactly reversed (such as *Jackson v. Badger*, 35 Minn. 52) will be apparent on a moment's reflection.

4. The contract contained a provision that if the title to the premises "is not good, and cannot be made good, this agreement shall be void," and the earnest-money refunded. Upon examination of the title, it was discovered that the land had been bid in by the state at the tax sale of 1883, for the taxes of 1882, for the sum of fifteen dollars, and the certificate of sale subsequently assigned (when does not appear) to one Billson. After waiting some time to have the defect in the title removed, and it not being done, plaintiff offered to take defendant's warranty deed (as provided in the contract), with the title as it was. Defendant declined to do this, claiming that, under the provision of the contract referred to, he had a right, if the title could not be made good, to declare the contract at an end. We need not determine whether or not this position is sound. Assuming that defendant's construction of the contract is correct, it is at least incumbent upon him to prove affirmatively that the title cannot be made good. This he has not done. He has neither proved that the notice of the expiration of redemption required by law had been given, or that the assignment to Billson was made after forfeiture to the state, so as to bring the case within *State v. Smith*, 36 Minn. 456. Therefore, for anything that appears, the right of redemption from this tax sale still continues, and the title to the land could be made good by paying fifteen dollars, and interest. We therefore think that the evidence shows a bind-

ing contract by defendant to sell and convey, and shows no valid reason why he ought not to and cannot perform.

Order reversed.

IMMATERIAL VARIANCE BETWEEN ALLEGATION AND PROOF does not require reversal of judgment: *Louisville etc. R. R. Co. v. Phillips*, 2 Am. St. Rep. 155; and variance is immaterial unless it misleads adverse party to his prejudice: *Dubois v. Beaver*, 82 Am. Dec. 326; *Lazier v. Westcott*, 82 Id. 404; *Gossom v. Badgett*, 99 Id. 658, and note.

PARTNER IS GENERAL AGENT FOR THE FIRM WITHIN THE SCOPE OF ITS BUSINESS: *Savings F. Soc. v. Savings Bank*, 78 Am. Dec. 390; *Barker v. Mann*, 96 Id. 373.

VENDEE IN EXECUTED CONTRACT FOR SALE OF REAL ESTATE, in order to escape payment, is bound to prove, beyond doubt, defect in title in whole or in part: *Cooper v. Singleton*, 70 Am. Dec. 333. In *Negley v. Lindsay*, 5 Am. Rep. 427, it was held that if the vendor bound himself to give possession and give a warranty deed, he must, in order to recover the purchase price, prove his title.

NEWBERY v. FOX.

[87 MINNESOTA, 141.]

MUNICIPAL CORPORATIONS. — DOCTRINE OF ULTRA VIRES IS APPLIED WITH GREATER STRICTNESS to municipal bodies than to private corporations; and, in general, a municipal corporation is not estopped from denying the validity of a contract made by its officers, when there has been no authority for making such a contract.

1D. — EXECUTED CONTRACT — DEFENSE OF ULTRA VIRES. — CONTRACT FOR GRADING STREET, made by the officers of a municipal corporation in the first instance, the duty to make the improvement not having been first imposed upon the adjacent proprietors, as required by the charter of the municipality, is unauthorized; and the other contracting party, not having been misled as to any fact, is not entitled to recover after performance on his part.

ACTION brought by the plaintiff, Newbery, on behalf of himself and all other citizens and tax-payers of the town of Taylor's Falls, to restrain the defendant, Fox, from enforcing a judgment obtained by him by default against said town, and to restrain the town and its officers from paying such judgment. Other facts in the opinion.

F. B. Dorothy, for the appellant.

H. N. Setzer, for the respondent.

DICKINSON, J. The only point presented by the appellant for decision is as to whether a contract, entered into in 1885 between the town council of the municipal corporation, the

town of Taylor's Falls, and the defendant, Fox, for the opening and grading of certain streets by Fox, was *ultra vires*, and whether the municipality should be heard to interpose that defense to an action by the other party to recover upon the contract after it had been performed. The corporation was empowered by its charter (Special Laws 1873, c. 2, and Special Laws 1881, Extra Sess., c. 44) to levy special assessments for such improvements upon the real estate in front of or adjacent to which the same should be made. The act of 1881 repealed certain sections of the prior act providing for the assessing of the cost of such improvements, in the first instance, upon the property deemed to be benefited thereby; and by section 10 of the later act it was provided that the town council should "order said improvements to be made by the owners of real estate, or occupants of such real estate, in front or adjacent to where said improvements are so ordered." Section 12 provides that such owners or occupants "shall make, or cause to be made, said improvements at their own cost and charges"; and further provides that, in case of their default, the council may cause the improvement to be made, and assess the expense upon the property. It is not controverted that the statute required that an order should have been made for the adjacent proprietors to make the improvement, and opportunity given them to do so, before the council could rightfully let a contract for the doing of it; and it is admitted that this was not done. Not only was the party entering into this contract legally chargeable with notice that by the public charter the authority of the council was thus restricted: *McDonald v. Mayor*, 68 N. Y. 23; 23 Am. Rep. 144; *Schumm v. Seymour*, 24 N. J. Eq. 143; but the allegation in the complaint, that the plaintiff warned the defendant that the contract was void before he commenced to perform it, is admitted by the answer.

The doctrine of *ultra vires* has, with good reason, been applied with greater strictness to municipal bodies than to private corporations, and, in general, a municipality is not estopped from denying the validity of a contract made by its officers, when there has been no authority for making such a contract: *Mayor v. Ray*, 19 Wall. 468; *Brady v. Mayor of New York*, 20 N. Y. 312; *Hague v. City of Philadelphia*, 48 Pa. St. 527; 1 Dillon on Municipal Corporations, 457; *Nash v. City of St. Paul*, 8 Minn. 143 (172). A different rule of law would, in effect, vastly enlarge the power of public agents to bind a

municipality by contracts, not only unauthorized, but prohibited by the law. It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents, and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent. In the case here presented, it is not to be denied that the town council had no authority to make this contract; that the charter set forth the conditions which would authorize such a contract to be made; that those prescribed conditions had not been fulfilled, nor did the defendant believe that they had been. The most that appears in his favor is, that, without being misled or mistaken as to the fact, but being warned that the contract was void, he nevertheless judged that it was legally valid; and being also so advised by the members of the council, he took the risk of performing it. The contract, being thus unauthorized, was not effectual as a contract, and the defendant does not appear in a position entitling him to invoke the doctrine of estoppel to aid him in enforcing his claim, as though the contract were obligatory upon the town. No other reason is urged in support of the answer demurred to than that which we have considered, and deeming this insufficient, the order sustaining the demurrer is affirmed.

PERSONS DEALING WITH MUNICIPAL CORPORATIONS ARE BOUND TO KNOW the authority of the latter's officers: *Sutro v. Pettit*, ante, p. 442.

WUOTILLA v. DULUTH LUMBER COMPANY.

[87 MINNESOTA, 153.]

MASTER AND SERVANT.—SERVANT IS NOT NECESSARILY GUILTY OF CONTRIBUTORY NEGLIGENCE, because he works near dangerous machinery uncovered, knowing its condition, although the master be clearly guilty of negligence in leaving the machinery in that condition. Master and servant do not stand upon the same footing in that regard.

ID.—IT IS MASTER'S DUTY TO SUPPLY SAFE INSTRUMENTALITIES for the use of his servant, and he is bound to exercise reasonable diligence in informing himself as to whether his machinery is safe; whereas, the servant, in the absence of notice to the contrary, or something to put him on inquiry, has a right to assume that his master has done his duty in this respect, and to rely on his superior judgment.

ID.—MERE FACT THAT SERVANT KNOWS DEFECTIVE CONDITION OF INSTRUMENT with which he works does not necessarily charge him with contributory negligence, or the assumption of risks growing out of the defects. The question is, Did he know, or ought he, in the exercise of ordinary common sense and prudence, to have known, the risks to which the condition of the instrument exposed him?

APPEAL by the defendant from an order refusing a new trial. The facts appear in the opinion. The defendant's requests for instructions to the jury, which were refused by the court, are as follows: "4. In cases of this kind, where the defect in the machine or other appliance from which the danger arises is of such a character, or occurs at such a time, that the employer cannot reasonably be expected to have knowledge thereof, it is the duty of the employee to give notice, and the neglect of such duty exempts the employer from responsibility. 5. In this case, if you find that it was the duty of plaintiff to oil the cogs in which he was injured, and the bearings immediately under the same, daily or oftener, and for that purpose he must necessarily have seen and observed the uncovered condition of the cogs in doing such work when the cover was off, you must find for the defendant, for the reason that, if this cover had not been off long enough before plaintiff was injured for him to have discovered it, it had not been off long enough to charge the defendant with neglect in failing to discover it; and if it had been off long enough to charge defendant with negligence in failing to remedy the defect, plaintiff was guilty of contributory neglect in remaining with and not reporting such defect, so that it might be repaired." "7. In case you find that defendant's foreman showed plaintiff the cogs in which he was injured, and explained to him the need there was in keeping that board in place, and that plaintiff appeared to comprehend the instruction, and afterwards worked there, with a board, evidently in plain view, off the gearing, so that it was exposed, then he was guilty of contributory negligence, and you must find for the defendant."

White, Shannon, and Reynolds, for the appellant.

Allen and Parkhurst, for the respondent.

MITCHELL, J. This was an action for damages for personal injuries alleged to have been caused by the negligence of defendant. The plaintiff was employed in defendant's saw-mill as an off-bearer, his duty being to stand at the head of the live rollers, and start the slabs, etc., down the rollers after they left the saws. In case a slab got crooked, or a piece of bark got into the rollers (which would occur occasionally), he had to leave his stand, and go down and straighten it or take it out. In doing this he had to go past a gearing, where two wheels mashed. On one occasion, as he was going down to

streighten a slab on the rollers, the gearing caught his clothing, and drew in his leg, causing the injuries complained of. The negligence charged against defendant consists in not boxing or covering the gearing.

The main contention here is, that the verdict was not justified by the evidence, for the reasons,—1. That it does not appear that defendant was guilty of any negligence; and 2. That it does appear that plaintiff himself was guilty of contributory negligence.

The first requires but little consideration. There was abundant evidence tending to prove that it was dangerous to leave the gearing open, and that ordinary prudence would have required it to be covered. There was also evidence that the covering had been off at least two weeks,—ample time for defendant to have discovered the fact and replaced it.

2. It is undisputed that plaintiff had known for two weeks before the accident that the gearing was uncovered, and that he continued to work there without objection or complaint. Defendant contends that this conclusively establishes, as a matter of law, contributory negligence. The grand fallacy running all through the argument of the learned counsel is in assuming that, if it was negligence for defendant to leave the gearing uncovered, it must necessarily have been negligence on the part of plaintiff to work near it while in that condition, and that, because he knew that it was uncovered, therefore he knew, or ought to have known, that it was dangerous to go near it. But the master and servant do not stand at all upon the same footing in these matters. It is the master's duty to supply safe instrumentalities for the use of his servants. He is bound to exercise reasonable diligence in informing himself as to whether his machinery is safe; whereas, the servant, in the absence of notice to the contrary, or something to put him on inquiry, has a right to assume that his master has done his duty, and to rely on his superior judgment. Of course a servant is bound to use his senses, and cannot be heard to plead ignorance of a danger that was obvious to any one on inspection; but, on the other hand, because he engages to work with or in the vicinity of machinery, he is not necessarily bound to know as much as his master ought to know as to what is or what is not safe. Again, it is one thing to be aware that machinery is defective, or in a particular condition, and another thing to know or appreciate the risks resulting therefrom. A man of ordinary intelligence and experience

may know the actual condition of an instrument with which he is working, and yet not know the nature or extent of the risks to which he is exposed. The mere fact that a servant knows the defects does not necessarily charge him with contributory negligence, or the assumption of risks growing out of those defects. The question is, Did he know, or ought he, in the exercise of ordinary common sense and prudence, to have known, the risks to which the condition of the instrumentalities exposed him? *Russell v. Minneapolis and St. Louis R'y Co.*, 32 Minn. 230; *Cook v. St. Paul etc. R'y Co.*, 34 Id. 45.

Now, in the present case, the plaintiff was not a machinist, nor employed as such. He was a mere common laborer in the mill. He had been employed at this point only about twenty days. He testifies (and the jury had a right to believe him) that he did not know that this gearing ever had been covered, or that it should have been covered; and that he did not know, and had never been told, that it was dangerous, or cautioned to keep away from it. There was no evidence that it was his duty to report that the gearing was uncovered. All that the witnesses on that point pretend to say is, that it was the duty of every employee to report if they saw anything wrong with the machinery. But the plaintiff did not, in fact, know that the gearing ought to be covered. Neither could a court say, as a matter of law, that the risk or danger was so obvious upon inspection that plaintiff ought, in the exercise of ordinary intelligence, to have understood it. One witness who worked in the mill, and who had worked in saw-mills for five years, testified that it would be quite possible for a man who was not acquainted with machinery not to anticipate danger in going by it. Defendant's own foreman, who admitted to have known for some time that the covering was off, testified that he did not think anybody would get hurt, that he never thought a man would get caught, and advanced the theory that the gearing was so near the floor that plaintiff could not have got caught unless he had kneeled down and shoved his knee into it. If that is the way it looked to the experienced foreman, this common laborer might well be excused in not realizing the danger. Under the circumstances, whether plaintiff was guilty of negligence was clearly a question for the jury; and they having answered it in the negative, no court can say, as a matter of law, that their verdict is not justified by the evidence.

What has been said disposes of most of the exceptions to

the charge of the court,—particularly to the refusal to give defendant's fourth and fifth requests. The fourth request was also properly refused, for the reason that it was inapplicable to the facts of the case. It assumed that plaintiff knew, or ought to have known, that the absence of a covering from this gearing constituted a defect. It also assumed that the removal of the covering was such a recent or sudden occurrence that defendant could not reasonably have been expected to have known the fact. The seventh request was also properly refused. If, instead of repairing the defect, defendant saw fit to allow the gearing to remain uncovered, and attempted to relieve itself from liability by "explaining" to plaintiff its dangerous character, it was not enough that he "appeared" to understand the explanation. If defendant proposed to relieve itself on any such ground, it was bound to see to it that plaintiff, in fact, understood it. The request was evidently framed in that form because the evidence showed that plaintiff understood very little of the English language.

The order denying a new trial must be affirmed.

MASTER IS BOUND TO SUPPLY SAFE MACHINERY AND APPLIANCES for use of his servants, and they, in the absence of notice, or something to put them on inquiry, have a right to assume that he has done his duty in this respect: See *Faren v. Sellers*, 4 Am. St. Rep. 256, and note.

MERE KNOWLEDGE BY SERVANT OF DEFECTS IN MACHINERY OR APPLIANCES will not bar his right to recover for injury resulting therefrom, unless he knew, or ought to have known, the consequent risk: *Faren v. Sellers*, 4 Am. St. Rep. 256.

BARBER v. MORRIS.

[87 MINNESOTA, 194.]

JURISDICTION—CONSTRUCTIVE SERVICE OF SUMMONS BY PUBLICATION.—

Minnesota statute (Gen. Stats. 1878, c. 66, sec. 64) authorizing a constructive service of summons by publication, "upon the filing" of an affidavit alleging the non-residence of the defendant, etc., makes such filing a prerequisite condition to an authorized publication. And if the affidavit be not filed until after the publication, even if it be done on the day of the entry of the judgment, the court acquires no jurisdiction, and its judgment is void.

ID. — IT APPEARING UPON FACE OF RECORD THAT SUMMONS IN ACTION WAS SERVED in a way ineffectual to confer jurisdiction, it will not be presumed that a valid service was made in some other way.

ID. — IN MINNESOTA, COURT ACQUIRES NO JURISDICTION BY ITS ATTACHMENT of property of the defendant in an action, without an authorized service of the summons.

Id. — JUDGMENT BEING VOID FOR WANT OF JURISDICTION APPEARING upon the face of the record, no title can be acquired by a purchaser at a sale under execution issued upon that judgment.

J. L. Dobbin and J. L. Parker, for the appellants.

C. A. Ebert, for the respondents.

DICKINSON, J. This is an action for the partition of real estate. The defendants denied the plaintiffs' alleged title. That title depends upon the validity of a judgment entered March 25, 1884, in favor of one Mary A. Becker, in an action by her against Peter Morris, who then owned an undivided half of the premises. In that action an affidavit for the publication of the summons was made on the eleventh day of January, 1884, such as is required by the General Statutes of 1878, chapter 66, section 64, alleging the non-residence of the defendant, and that his place of residence was not known to the plaintiff; and thereupon an order was made by the court, on the fourteenth day of January, for the publication of the summons. The statute did not at that time require an order for such publication, but prescribed that "upon the filing of an affidavit," such as has been just referred to, the service might be made by the publication of the summons. The affidavit, however, was not filed until March 25th, the day of the entry of the judgment; neither was the order above referred to filed until that day. On the 16th of January a writ of attachment was issued in that action, and levied upon this property. The summons was published for six weeks following the nineteenth day of January, and, upon proof of the default of the defendant, judgment was entered March 25th. The plaintiffs' asserted title was acquired through sale under execution issued upon that judgment.

The statute prescribes the means, through a constructive service of the summons, by which a court may acquire jurisdiction to render judgment affecting property within the state. This mode of conferring jurisdiction is effectual only as the statute makes it so; and whatever the statute prescribes as a prerequisite condition cannot be dispensed with. The statute allowing publication to be made "upon the filing" of the affidavit makes that act a condition essential to constitute an authorized publication. This not having been done until after the publication had been completed, the court acquired no jurisdiction, and its judgment was void: *Anderson v. Curn*, 27 Wis. 558; *Cummings v. Tabor*, 61 Id. 185; *Bradley v. Jamison*, 46 Iowa, 68; *Murphy v. Lyons*, 19 Neb. 689.

The court, by its order of publication, did not dispense with the requirement of the statute respecting the filing of the affidavit, nor could this be done. The defect appears upon the face of the record, the affidavit being officially indorsed by the clerk, "Filed March 25, 1884," and the court finds in this case that it was not filed until that date. The recital in the judgment of the summons, having been duly served, is qualified by the fact shown by the record, and which was a proper part of the judgment roll, as to the manner in which service was made. It thus appearing that the affidavit prescribed by statute was filed on the day when the judgment was entered, it will not be presumed that one was filed prior to that time: *Galpin v. Page*, 18 Wall. 350, 366; *Clark v. Bryan*, 16 Md. 171; *Clark v. Thompson*, 47 Ill. 25; *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742; *Ely v. Tallman*, 14 Wis. 28; *Freeman on Judgments*, sec. 125.

We are all of the opinion that what was said to the contrary in *Gemmell v. Rice*, 13 Minn. 371 (400), is opposed both to authority and to principle, and should be overruled. While Mr. Justice Berry, by reason of sickness, does not take part in this decision, it is just to state that in the consideration of the case he also expressed his conviction that *Gemmell v. Rice* was in this respect wrong.

The plaintiffs sought to sustain the judgment by testimony tending to show the delivery of an affidavit to the clerk on the 16th of January. But there is no finding that such was the fact, nor does the evidence conclusively show that it was so. Whether or not there is anything in the plaintiffs' theory that delivering the affidavit to the clerk, even though it was not filed by him, would be sufficient to authorize the publication, the point rests upon an assumed fact, not established by the findings of the court, and is not now available to the plaintiffs. The finding of the court that no affidavit was filed until March 25th is justified by the evidence, not only as respects the actual filing, but as to the delivery to the clerk for filing, if that were all that was requisite, and upon this finding the conclusion of the court as to the jurisdiction was right. Whether the evidence to which we have alluded was admissible is not a question involved in this appeal, and we do not consider it.

The court did not acquire jurisdiction by its attachment of property without any service of the summons. An attachment alone has not such an effect where, as is the case in this

state, the attachment is ancillary to the action, a provisional remedy in the action, and not the means prescribed for the purpose of conferring jurisdiction: *Cleland v. Tavernier*, 11 Minn. 194; *Jarvis v. Barrett*, 14 Wis. 591; *Bell v. Olmsted*, 18 Id. 69.

The judgment being void for want of jurisdiction, and that appearing upon the face of the record, no title was acquired by the purchaser under the execution: *Harrington v. Loomis*, 10 Minn. 366; Freeman on Judgments, sec. 117.

Order affirmed.

NOTICE AND OPPORTUNITY TO BE HEARD ARE ESSENTIAL REQUISITES TO JURISDICTION of all courts, even in proceedings *in rem*, and judgments without jurisdiction, as without proper order of publication of summons, are nullities: *Dorr v. Rohr*, 3 Am. St. Rep. 106, and note.

SERVICE OF PROCESS BY PUBLICATION, AND EFFECT TO CONFER JURISDICTION: See *Hahn v. Kelly*, 94 Am. Dec. 742, and extended note thereto.

PALMER v. NORTHERN PACIFIC RAILROAD COMPANY.

[87 MINNESOTA, 228.]

RAILROAD COMPANIES. — WHERE ANIMAL IS WRONGFULLY ON TRACK OF RAILROAD COMPANY, without the fault of the company, those in charge of its trains owe no duty to look ahead and ascertain if the animal be there, and are only bound to exercise care in respect to it from the time they discover its peril. This rule is equally applicable in the case of an animal wrongfully upon a highway at a railroad crossing.

John C. Bullitt, for the appellant.

B. F. Hartshorn, for the respondent.

GILFILLAN, C. J. Action for running upon and killing plaintiff's horse. The horse was at large in a public highway, grazing near the crossing of defendant's road, when, a train of cars coming along at its usual speed, the horse ran upon the track in front of the train, and the train ran upon and killed it. It does not appear that the electors of the town had determined where cattle, horses, etc., should be permitted to go at large. The horse was therefore wrongfully in the highway. It is doubtful that the evidence as to the defendant's negligence, and also as to contributory negligence on the part of plaintiff, was such as to justify submitting the case to the jury. Conceding, however, that it was, still there must be a new trial for refusal of the court to instruct the jury as requested by defendant.

There were several requests on its behalf, presenting, in various forms, practically the same proposition, which the court refused to give. We need specify only two of them, as they express the gist of all: "If the jury believe from the evidence that the plaintiff's horse, at the time of the injury complained of, was running at large, it is instructed that the verdict must be for defendant, unless it further believes that, after the discovery of the peril of the horse, the defendant's servants were guilty of negligence"; and that if the horse was running at large, plaintiff, in order to recover, must prove two facts, viz.: "That, prior to actually striking the horse, the defendant's servants discovered its peril"; and "that, after the discovery of the horse's peril, defendant's servants failed to do something which they ought to have done to avoid striking it, and which, if done, would have been effectual to prevent the collision."

These propositions, or rather, this proposition twice stated, is in exact accord with what was decided by this court in *Locke v. First Division etc. R. R. Co.*, 15 Minn. 350, and reiterated in *Witherell v. Milwaukee and St. Paul R'y Co.*, 24 Id. 410. It is true, those were cases where the animals were wrongfully upon the lands of the railroad company, while in this it was wrongfully upon the highway, at the place where the trains had a right to cross,—there through the fault of the plaintiff, and not of defendant. This difference makes no difference in the principle. In either case, those in charge of the train were not bound to presume that the animal would be where it was. They "had a right to presume that the plaintiff would keep her at home, where alone she belonged; consequently they owed no duty to plaintiff to look ahead, and see where the animal was": *Locke v. First Division etc. R. R. Co.*, *supra*. Their duty to persons or animals rightfully on the highway would have required them to be on the lookout to ascertain if there was any chance of injury to such persons or animals; but with that duty, and its extent and its observance, the plaintiff, whose animal, through his own fault, was wrongfully there, had no concern. Defendant is no way answerable to plaintiff for any neglect in its duty towards others. Without any duty to anticipate that the horse might be in danger, or to exercise care to ascertain if it was in danger, the duty of those in charge of the train of cars in respect to the horse arose from the time they discovered it was in danger.

Order reversed.

RAILROAD COMPANY WILL NOT BE LIABLE FOR INJURY TO ANIMALS straying upon its track, which injury is not the result of gross negligence on its part: *St. Louis etc. R. R. Co. v. Linder*, 89 Am. Dec. 319; *Eames v. Salem R. R. Co.*, 96 Id. 676. But where cattle have strayed onto a railroad track, and the engine-driver sees them, but does not stop nor slacken speed, but runs upon and kills them, this is gross negligence, for which the company is liable: *Chicago etc. R. R. Co. v. Kellam*, 34 Am. Rep. 128.

HERRICK v. MORRILL.

[87 MINNESOTA, 250.]

SIGNATURE TO SUMMONS IN CIVIL ACTION NEED NOT BE IN HANDWRITING of the plaintiff or his attorney. Any signature, whether written, printed, or lithographed, which the party issuing the summons may adopt as his own, will be sufficient.

JUDICIAL SALE. — LANDS SOLD IN EXECUTION OF STATUTORY POWER ARE DESCRIBED WITH SUFFICIENT CERTAINTY, if all persons invited by the notice to become bidders are enabled to identify the property, and know what was being sold.

ID. — EVIDENCE OF EXTRINSIC FACTS AND CIRCUMSTANCES IS ADMISSIBLE TO IDENTIFY PREMISES SOLD, or to apply the description thereto, but a fatally defective description in a sale on execution cannot be helped out by evidence of facts tending to prove what property the officer probably intended to advertise and sell.

COURTS WILL TAKE JUDICIAL NOTICE OF FACT that a township, whether used in the sense of a municipal division of a county or of a township according to government survey, has no subdivisions known as "blocks." That term is applied only to the subdivisions of a platted town, village, or city.

Edward Savage, for the appellant.

Charles D. Kerr, for the respondent.

MITCHELL, J. This was an action to determine adverse claims to real estate. Both parties claim through the Little Falls Manufacturing Company as a common source of title. Plaintiff claims title,—1. To certain tracts under an execution sale made July 28, 1869, on two judgments known as the Herrick judgments; 2. To other tracts under an execution sale made April 26, 1871, on the junior Herrick judgment, and two others known as the Hidden judgments; 3. To still other tracts under an execution sale made June 11, 1874, on the junior Herrick judgment; 4. To still further tracts on an execution sale made June 25, 1875, on this same judgment. The defendant claims title under a deed from the Little Falls Manufacturing Company to Arthur Eustis, executed July 11, 1882, and certain mesne conveyances from Eustis to defend-

ant. The court below found against plaintiff upon all four of these execution sales. The grounds upon which the court held invalid the title under the execution sale of July, 1869, were: 1. That the Herrick judgments (which were rendered on default) were void, because the summons in the actions were not subscribed by the plaintiff or his attorney; 2. That the certificate of sale did not describe the real estate sold with sufficient certainty; 3. That the certificate of sale was not executed or acknowledged by the sheriff of Morrison County. We shall consider these three in their order.

The summons in the two Herrick actions had the printed but not the written names of the plaintiff's attorneys affixed, and the court below, for that reason, held the judgments void upon the supposed authority of *Ames v. Schurmeier*, 9 Minn. 206 (221). Even if the decision in that case is to be adhered to, it does not follow that the judgments are void, or that they can be thus collaterally attacked by the parties to those actions or their privies. Being domestic judgments of a court of common-law jurisdiction from which an appeal would lie, they would be valid as between the parties until reversed, notwithstanding this defect in the summons: *Freeman on Judgments*, sec. 126; *Hendrick v. Whittemore*, 105 Mass. 23. The summons would at most be merely voidable, and the defect could only be taken advantage of directly in the actions themselves, and could not be made the ground of a collateral attack on the judgments by the parties, or those in privity with them. We have no hesitation, however, in saying that, in our opinion, the decision in *Ames v. Schurmeier*, *supra*, was erroneous, and should not be followed. In fact, it was long since vitually overruled by *Hotchkiss v. Cutting*, 14 Minn. 537. In the first case this court held that the summons must have the name of the plaintiff or his attorney attached in his own proper handwriting. In the latter case it was held that a written signature purporting to be that of the plaintiff in the action, but made by his agent in his presence and by his express direction, was sufficient. This does away with the necessity of a signature in the proper handwriting of the party or his attorney, and it logically follows that there need be no written signature at all; that any signature, whether written, printed, or lithographed, which the party issuing the summons may adopt as his own, will be sufficient. Any of these will accomplish the desired purpose, and give the defendant all the necessary information. There is no middle ground.

The statute either requires the signature to be the proper handwriting of the plaintiff or his attorney, or it may be complied with by attaching any of the other forms of subscription suggested. The decision in *Ames v. Schurmeier*, *supra*, seems to have been made upon the erroneous presumption that "subscribed" meant a "written signature," and that the statute defining the meaning of the words "written signature" applied to the construction of the statute requiring the summons to be "subscribed": *Barnard v. Heydrick*, 49 Barb. 62; *Mutual Life Ins. Co. v. Ross*, 10 Abb. Pr. 260, note; *Mezchen v. More*, 54 Wis. 214.

This brings us to the question of the sufficiency of the description of the property in the certificate of sale. The property in controversy consisted of certain lots in certain blocks in the town of Little Falls, in the county of Morrison, according to a map or plat thereof recorded in the office of the register of deeds. The notice of sale, which was published in the Sauk Rapids Sentinel, described the property levied on and to be sold as situated in Morrison County, and as being certain specified lots in certain designated blocks "in the town of Little Falls." There would seem to be no question but that this description was sufficient, and gave full notice to all parties of what property was to be sold. The certificate of sale, after reciting the levy, and the publication of notice in the Sauk Rapids Sentinel, described the property sold the same as the notice of sale, except that it uses the word "township" instead of "town," describing it as lots and blocks "in the township of Little Falls." The whole trouble, if any, arises from the use of the word "township" instead of "town." The word "town" often means "township," but "township" never means "town" in the sense of a platted village or town site. But it clearly appears that it was property in the town or village of Little Falls that was advertised for sale; and hence, as already remarked, all parties had notice of what property was to be sold. The court will take judicial notice of the fact that a "township," whether used in the sense of a municipal division of a county or of a township according to government survey, has no subdivisions known as blocks. That term is applied only to the subdivisions of a platted town, village, or city. In view of these facts, we think it apparent that the word "township" is a mere clerical error, being inadvertently used for the word "town." If the word "township" be rejected entirely as surplusage, enough remains to constitute

a good description of the property as being in the town or village of Little Falls. The difference between the description in this certificate and that contained in the certificate considered in *Herrick v. Ammerman*, 32 Minn. 544, will be apparent on inspection.

We do not fully understand the point to the objection that the certificate was not acknowledged or executed by the sheriff of Morrison County. It was executed and acknowledged by the deputy sheriff who made the levy and the sale. As we understand the law, the officer who makes the sale is the proper person to execute the certificate.

The court found as a fact that the amount realized from this sale was sufficient to fully satisfy both of the Herrick judgments. Without discussing the evidence, it is sufficient to say that we think it justified the finding. It contains facts and figures sufficient to enable the court to arrive at the result by a mere mathematical calculation. It follows that the power to sell on execution under either of these judgments was exhausted, and that plaintiff acquired no title under either the sale of June 11, 1874, or of June 25, 1875.

This leaves only the sale of April 26, 1871, to be considered. This was made on three executions issued severally on the junior Herrick judgment and the two Hidden judgments. The objections that there was no evidence that the Hidden judgments had been assigned to plaintiff, and that the property was sold at one sale on all three executions, and that one of the judgments was docketed for too large an amount, require no consideration, except to say that they furnish no ground for holding the title acquired at the sale void. The fact that one of the executions was void because the judgment on which it was issued was already satisfied would not render the sale void if the other executions were valid: *Gunz v. Heffner*, 33 Minn. 215.

The description of the property purporting to have been sold is, however, fatally defective. This was the certificate of sale considered by the court in *Herrick v. Ammerman*, *supra*, when we held the description as to one tract insufficient. The description of the lots now in controversy is the same as the one considered in that case. Counsel for appellant, however, questions the correctness of what was there said as to a distinction between descriptions in conveyances *inter partes*, and those in sales made in the execution of a statutory power. He also claims that this appeal comes up on a different state of

proofs. In what was said in *Herrick v. Ammerman*, *supra*, we did not mean to intimate that, to constitute a good description on a sale in execution of a statutory power, it must be such that from a mere inspection of it the court would know what land was intended. Nor did we intend to be understood that parol evidence of extrinsic facts and circumstances was not admissible to apply the description, or identify the premises described. All that was intended to be held was, that the land should be described with sufficient certainty to enable all parties to identify it, and know what was being sold; that in cases of the execution of a statutory power, when the owner of the land intends nothing, and the law through its officers acts in hostility to him, you cannot aid or help out an inherently insufficient description by extrinsic evidence tending to prove what the officer probably intended to sell. In these sales the policy of the law requires, not that there should exist the means of showing at some future time what is otherwise indefinite and uncertain, but that, at the time of the sale, it should be within the power of all who are by the notice invited to become bidders to know what was offered, and that it should not be left to be surmised or guessed at some future time as to what the officer intended to sell. This we think is in accordance with reason and sound policy, as well as supported by authority: *Jackson v. Roosevelt*, 13 Johns. 97; *Jackson De Lancy*, 13 Id. 536; 7 Am. Dec. 403; *Childs v. Ballou*, 5 R. I. 537, 546; *Mason v. White*, 11 Barb. 173.

In the present case, it will be observed that the defect in the description exists in the notice as well as the certificate of sale. The only important evidence in this case not in the former is, that the description, as far as it goes, fits this property, and fits no other in the county belonging to the judgment debtor. This is not evidence of extrinsic circumstances to identify the premises in the light of which the description in itself appears certain and sufficient, but merely of facts tending to prove what property the sheriff probably intended to advertise and sell under the imperfect and defective description. The description cannot be helped out in this way. These facts were presumably not known to bidders at the sale; and even if they were, they are not to be left thus to an uncertain surmise as to what is being sold. We still think the description bad.

The plaintiff also claimed some tracts under tax titles; but as to those the court below made no findings. The proper

course for plaintiff to have pursued was to have requested the court to amend its findings in that regard. The plaintiff not having done so, the sufficiency of the alleged tax titles cannot be here considered.

The same remark disposes of the point that the court below failed to decide certain objections made on the trial to the admission of evidence, which were taken under advisement, instead of being disposed of when made. The plaintiff should have requested the court to state in the "case" how these objections were disposed of.

The judgment is affirmed in all things, except in so far as it adjudges that the defendant is the owner of those tracts of land and lots which were sold to plaintiff, July 28, 1869, on executions on the Herrick judgments, and the plaintiff's claim of title thereto is void, which part of the judgment is hereby reversed.

DESCRIPTION OF PROPERTY IN NOTICE OF JUDICIAL SALE is the subject of a note to *Hoffman v. Anthony*, 75 Am. Dec. 705.

JUDICIAL NOTICE, AND WHAT ARE FACTS FOR: See the extended note to *Lanfear v. Mestier*, 89 Am. Dec. 663-696.

FROST'S DETROIT LUMBER WORKS v. MILLERS' ETC. MUTUAL INSURANCE COMPANY.

[37 MINNESOTA, 300.]

INSURANCE — CONSTRUCTION OF POLICY — INCREASE OF RISK. — A policy of fire insurance provided that if the insured buildings should be "altered, added to, or enlarged," due notice must be given and consent indorsed on the policy. A by-law, made part of the contract, provided that whenever a building should be "altered, enlarged, or appropriated to any other purposes than those mentioned, or the risk be otherwise increased," without the consent of the insurer first obtained, the policy should be void. Under these provisions in the policy, notice to the insurer and consent to a material enlargement of the building are required, although the risk be not in fact thereby increased. A written permission in such policy "to make necessary alterations and repairs" does not authorize a material enlargement of the building by an addition twelve feet wide and two hundred feet long.

ID. — WHILE WRITTEN PROVISION OF CONTRACT SHOULD PREVAIL over one inconsistent with it, and which is part of a printed form, adopted for general use, yet only so far as it is apparent that the parties intended to modify or disregard the printed stipulations will the latter give way.

ID. — PAROL EVIDENCE THAT ENLARGEMENT OF BUILDING INSURED WAS CONTEMPLATED at the time the insurance was effected is inadmissible to vary the terms of the written contract of insurance relative to the enlargement of insured buildings.

ID. — CONTRACT IS TO BE CONSTRUED IN LIGHT OF CIRCUMSTANCES UNDER WHICH IT WAS MADE, and a contract for insurance, to run for a period of years, made upon a building and machinery, then known to be in process of construction, is applicable to the property when complete as the parties had contemplated. A description in the policy of the building insured as a "saw-mill building" does not limit the use of the property to the purposes of a saw-mill.

ACTION upon an insurance policy, the insured property having been destroyed by fire. The material facts appear in the opinion. The verdict was for the plaintiff, and the defendant appealed from an order refusing a new trial.

Benton and Roberts, and M. B. Koon, for the appellant.

Torrance and Fletcher, for the respondent.

DICKINSON, J. Our decision of this appeal will be based principally upon the construction given to the contract of insurance as respects the enlargement of the building insured. One of the printed clauses of the policy is as follows:—

"Repairs and Additions.—Such ordinary repairs as may be necessary to keep the premises in good condition are permitted by this policy; but if the buildings hereby insured be altered, added to, or enlarged, due notice must be given and consent indorsed hereon."

A by-law indorsed upon the policy, and by the terms of the policy made a part of the contract, contains the provision that "whenever a building insured by this company, or containing the property insured, shall be altered, enlarged, or appropriated to any other purposes than those mentioned, or the risk be otherwise increased, . . . without the consent of the company first obtained in writing, such policy shall be void."

About a year and a half after the insurance, the building (which was until then about fifty-three feet wide and two hundred feet long) was extended on one side so as to make it twelve feet wider through its whole length of two hundred feet. The jury found specifically that this enlargement did not increase the risk. If the provision first above recited had stood alone, there would have been no doubt that a material enlargement of the building, without the consent of the insurer, would have constituted a violation of the condition of the policy, even though the risk might not have been in fact thereby increased. It was competent for the parties by their contract to thus leave it in the power of the insurers to determine whether in their judgment the risk would be increased, and whether or not they would continue the insurance, if the

situation or condition of the property should be changed by any material addition or enlargement. The contract explicitly reserving this right to the insurers to exercise their own judgment in the premises, they are not to be deprived of it, and held bound, notwithstanding the disregard by the insured of the conditions of the contract, merely because in the judgment of a jury the change did not in fact increase the risk. The only doubt as to the construction of the contract grows out of the provisions in the by-law, that if a building insured shall be "altered, enlarged, or appropriated to any other purposes than those mentioned, *or the risk be otherwise increased,*" etc. But in view of the distinct, unqualified, and apparently complete provision first recited, we are of opinion that the words in the by-law, and which we have put in Italics, cannot be construed so as to affect the plain meaning of the former provision. The two provisions are consistent, if the qualifying effect of the italicized words be limited to the immediately antecedent clause, "appropriated to any other purposes than those mentioned." The result of this construction is, that the policy would be avoided by any material enlargement or alteration of the building without the consent of the insurer, or by the appropriation of the building to other purposes than those mentioned, if the risk should be thereby increased, or if the risk be increased otherwise than by appropriating the property to other uses than those mentioned: *Lyman v. State Mut. Fire Ins. Co.*, 14 Allen, 329.

That the enlargement was a material one, such as would come within this stipulation of the contract, we do not doubt. Under the construction which we have put upon the policy, the fact that the risk was not increased, as the jury considered, does not do away with the invalidating effect of the disregard by the assured of this condition. There was, however, written in the policy a permission "to make necessary alterations and repairs," and it is claimed that this was a necessary alteration. While the written provision of a contract should prevail over one which is inconsistent with it, and which is part of a printed form, adopted for general use, yet only so far as it is apparent that the parties intended to modify or disregarded the printed stipulations will the latter give way. We are unable to construe this writing as wholly inconsistent with, or as intended to wholly do away with, the requirement expressed in the printed condition, that if the building be "altered, added to, or enlarged," notice must be given and consent

indorsed. It is operative to qualify the provision respecting alterations merely, without necessarily affecting that respecting additions or enlargements. Necessary alterations and repairs upon the existing structure, whatever such "alterations" might properly include, were authorized; but not a material enlargement of the whole building, such as was made in this case.

There was evidence directed to showing that this enlargement was contemplated by the assured when the contract was made, and that the agent was advised of this at the time. The building was in process of construction when the insurance was effected, and the contract of insurance should be deemed applicable, not only to the incomplete structure, but to the building when completed. But, as we understand the evidence, this addition can hardly be deemed to have been a completion of the process of construction, but an enlargement of an already complete structure. It was made long after the original structure was completed, and involved the tearing down of one side of the same two hundred feet in length. As we understand the facts sought to be shown, the proof was incompetent, under the rule which forbids oral evidence to vary the terms of a written contract.

For the reasons above expressed, we think that the verdict cannot stand, and there must be a new trial.

Some other questions are involved in the appeal which it is expedient that we should pass upon, as they may be expected to arise again if there should be a retrial of the cause. Without referring particularly to the evidence of the agency of Smith and Spencer, we will say that the evidence is deemed to have been sufficient to justify the conclusion that, for the purpose of effecting this insurance, those persons were the agents of the defendant.

Because parol evidence was received, and the question left to the jury as to whether the use to which the building was put was such as the parties had contemplated, the defendant contends that the rule was violated which requires that the written contract only shall determine the intention of the parties. Attention is particularly called to the term "saw-mill building," by which the building insured is designated in the policy; also to the provision above recited from the by-law avoiding the policy if the property shall be "appropriated to any other purposes than those mentioned." The building was used at the time of the fire for the sawing of lumber from logs,

and also as a box factory, having in it proper machinery for those purposes, and some dry-kilns for drying lumber by steam. The principle relied upon by the appellant is not applicable. The contract is to be construed in the light of the circumstances under which it was made. The insurance to run five years was effected while the building was known to be in the process of construction and equipment with machinery. The plaintiff had another building near this, which was called the "factory building." The policy insured the plaintiff as follows: "\$2,083.33 on their brick composition-roofed saw-mill building; . . . \$1,666.60 on their machinery of all kinds, both fixed, movable, their settings, parts, and appliances, circular, edging, and butting saws, shafters, gearing, belting, pulleys, hangers, tools, fixtures, millwright work, boilers and engines, steam, gas, and water pipes, while contained in said mill building; \$1,041.27 on lumber contained in said mill-yard, and on dock attached to said mill premises; \$280.80 on lumber in process contained in said mill building."

In the light of the circumstances to which we have referred, which were known to the plaintiff, and to the agent at least of the defendant, it is difficult to read the policy as specifying the purposes for which the property was to be used. The plainer purpose and effect of the term "saw-mill building" was to describe and distinguish the property insured, not to declare the purposes for which only the mill should be used: *Everett v. Continental Ins. Co.*, 21 Minn. 76. This term of description occurs only in that part of the policy employed to designate the property insured, and the amount of insurance upon it. It is used in the application only in the same connection. It would seem, too, from the policy itself, that it was contemplated that the mill would be used for other purposes than the sawing of logs into lumber, and that lumber was to be then subjected to some other process of manufacture; for a part of the insurance was specifically on "lumber in process." The printed clause in the by-laws was therefore inapplicable to limit the use of the property to the purposes of a saw-mill, for the reason that the uses to which it was or was to be appropriated were not "mentioned." There was therefore no error in this particular of which the defendant can complain. It follows, too, that it was immaterial whether an increased danger arose from the dry-kilns, if they were a part of the original construction in accordance with the contemplation of the parties.

For the reason stated in the first part of this opinion the order refusing a new trial is reversed.

INSURED IS BOUND TO DISCLOSE ALTERATION OR CHANGE IN INSURED PROPERTY after issuance of policy, if he would have been bound to disclose such a condition of the property at the time of making the application: *Calvert v. Hamilton M. I. Co.*, 79 Am. Dec. 744.

CONTRACT IS TO BE CONSTRUED IN LIGHT OF SURROUNDING CIRCUMSTANCES: See *Smith v. Kerr*, 2 Am. St. Rep. 362.

WILSON v. WINONA AND ST. PETER R. R. Co.

[37 MINNESOTA, 326.]

MASTER AND SERVANT—RISKS INCIDENT TO EMPLOYMENT. — Employee of railroad company, who had the management of the business at the company's yard, including the switching and making up of trains, and who was familiar with the situation of the tracks in the yard, and knew that a certain frog was left in a condition unsafe and dangerous to persons switching cars, must be held to have taken upon himself the risks incident to the situation of the track, from which he was not relieved by a conditional promise by a section foreman to improve the track at that point "if he got time some Saturday afternoon." The company was not bound by such promise, and there was no reasonable connection between it and the employee's continuance in the business.

APPEAL by the defendant from an order granting a new trial, the action having been dismissed when the plaintiff rested.

Wilson and Powers, for the appellant.

Daniel Buck, and Pfau and Freeman, for the respondent.

VANDEBURGH, J. The plaintiff, widow of James Wilson, deceased, and administratrix of his estate, brings this action to recover damages for injuries resulting in his death, and alleged to have been caused by the negligence of the defendant. In the yard of the company at Mankato, it is alleged that a certain frog connecting the main track with a switch-track was left in an unsafe and unprotected condition, and that the road-bed was improperly constructed at that point, in that an open space was left under the rail, so that the deceased, while engaged in the business of the company, accidentally caught his foot in or under the frog, and was run over and killed by the cars. This yard is connected with the main line of the company by a spur-track about three miles long, and it appears

that the deceased was conductor on this short line, and had the management of the business at the yard, including the switching and making up of trains. He had been so engaged for about three years, and was familiar with the character and situation of the tracks in the yard, including the frog and track in question.

The evidence shows that the track at this point was constructed in the same manner, and left in the same condition, as at other frogs in the yard. It was put in and constructed in September, 1880, and the accident occurred on the 22d of June, 1881; and it appears that the deceased knew the risks and dangers connected with the use of the track at this point to persons engaged in switching while coupling and uncoupling cars. The deceased, at the time he was injured, was attempting to uncouple cars while in motion. He was, at the same time, giving directions or signals to the engineer, who, with the brakeman then stationed on the cars sought to be separated, was subject to his control, and while he was so occupied and walking between the rails the accident occurred. It appears, we think, that the cars could have been safely uncoupled by causing the brakeman to bring the rear cars to a stop, and thus save the risk.

1. Conceding that the questions of the negligence of the company in constructing the track, and of the contributory negligence of the deceased in attempting to uncouple cars while in motion, and occupied in giving directions to his subordinates, were for the jury, still we think there is no doubt that it must be held that he took upon himself the risks incident to the situation of the track, upon the undisputed facts of the case, unless it is made to appear that he was relieved therefrom by the acts or promises of the company: *Anderson v. Morrison*, 22 Minn. 274; *Hughes v. Winona etc. R. R. Co.*, 27 Id. 137; *Craver v. Christian*, 36 Id. 413; *Sherman v. Chicago etc. R'y Co.*, 34 Id. 259; *Sullivan v. India Mfg. Co.*, 113 Mass. 396.

2. It is, however, claimed that, before the accident, he notified the section foreman, who had charge of the repairs of the track upon that part of the road, of the defect in the track or road-bed at this particular place, and that the latter promised to remedy it, and that, in continuing in defendant's employ thereafter, he must be deemed to have relied upon the promise, and to be relieved of any responsibility arising from such risks. The determination of this question must rest entirely upon the construction to be given to the evidence of the wit-

ness Madden, the section foreman referred to, who was the only witness who testified on the subject. It appears from his evidence that he was subordinate to the road-master, and subject to the orders of the latter, and that his regular and ordinary work was to see that the track was kept in repair or "good shape, and safe for trains to pass over." He had nothing to do with new work or changes in the construction of work already completed, except as ordered by his superior. The frog and side-track were constructed by him under the orders of the road-master, leaving a space of from one to two inches under the rail for the water to escape. No changes were made in it until the accident happened. The work was done in the usual way, and he received no instructions to modify it. The evidence shows that, if the earth had washed out, it would have been his duty to have restored it to its normal condition by repairs. It is not shown, however, that it was within the scope of his duty to fill or "plug" the space in question, as the deceased desired, without orders, nor was his promise in itself sufficient to bind the company.

Madden was not subject to the orders of the deceased. The first time the latter spoke to him about it was more than a month before the accident, when Madden's reply was: "I told him I had no orders." "He spoke to me to plug it. I told him I had no orders to fill it, and I could not do it without orders." And about two weeks before the injury, he says deceased again addressed him on the subject. "He said that was where he done all his switching. It was not very nice. It was not very safe, and he would like to have the rails filled in between." "I told him that if I got time I would fix it some Saturday in the afternoon. This is the answer I made him." There is no other evidence on the subject. We think it presented no question for the jury. The deceased had had long experience in the railroad service in various capacities. He was clearly aware of the dangerous nature of this frog to those engaged in switching. The promise was made by a subordinate subject to the orders of a superior, as he was distinctly informed, and indefinite and contingent in its character. He was not warranted in relying upon it, particularly as he had control of the movements of the cars, and by the aid of the brakeman, could have accomplished the desired result without risk: *Marquette etc. R. R. Co. v. Spear*, 44 Mich. 169; 38 Am. Rep. 242. We fail to see any reasonable connection between the promise of Madden and Wilson's continuance in

the business: *Sweeney v. Berlin etc. Co.*, 101 N. Y. 520, 525; 54 Am. Rep. 722.

As there is no conflict in the evidence upon any material point in the case, and its interpretation is not doubtful, a dismissal in the nature of a nonsuit was proper.

Order reversed.

SERVANT ASSUMES ORDINARY RISKS INCIDENT TO THE EMPLOYMENT: *Lewis v. Seifert*, 2 Am. St. Rep. 638; and see *Wuotilla v. Duluth Lumber Co.*, ante, p. 832.

MASTER'S PROMISE TO REPAIR DEFECT, TO JUSTIFY SERVANT'S CONTINUANCE in employment, must be definite, and to be exercised within a reasonable time: See *Indianapolis etc. R'y Co. v. Watson*, ante, p. 578, and note; *Atchison etc. R. R. Co. v. Sadler*, ante, p. 729.

STATE v. BECHDEL.

[87 MINNESOTA, 360.]

RES JUDICATA. — FORMER ADJUDICATION ON QUESTION OF RIGHT TO CUSTODY OF INFANT CHILD, brought up on *habeas corpus*, may be pleaded as *res judicata*, and is conclusive upon the same parties, upon the same state of facts. Such a case is really one of private parties contesting private rights, under the form of proceedings on *habeas corpus*, and is distinguishable from one in which the writ is sued out on behalf of a person unlawfully restrained of his liberty.

HABEAS CORPUS to obtain the custody of an infant. The return to the writ set out former proceedings by *habeas corpus*, instituted by the relator in this suit, in which were sought to be determined the questions here raised.

Henry J. Gjertsen and A. Danford, for the relators.

R. A. and F. C. Irwin, and H. J. Peck, for the respondents.

MITCHELL, J. In *In re Snell*, 31 Minn. 110, this court held that a decision, under one writ of *habeas corpus*, refusing to discharge a prisoner, is not a bar to the issuing of another writ, based upon the same state of facts, nor to a hearing and discharge thereon. While there is room for a difference of opinion, and in fact a conflict of decisions, upon this question, yet, in view of the origin, history, and purposes of this writ as a "writ of liberty," we adopted this rule in this class of cases in which the liberty of the citizen is the question directly involved. But such cases are clearly distinguishable, we think, both upon principle and authority, from those in which the writ is sued out merely for the purpose of deter-

mining which of two parties is entitled to the custody of an infant child. In the latter, the question is not really whether the infant is restrained of its liberty, but who is entitled to its custody? It is true that the charge is, that the child is unlawfully restrained, etc.; but the gist of this charge is not that the child is unlawfully deprived of its liberty, but that such restraint is in prejudice of the right of the relators to its custody. The case is really one of private parties contesting private rights, under the form of proceedings on *habeas corpus*.

In our judgment, in such cases, both principle and considerations of public policy require the application of the doctrine of estoppel to judicial proceedings. We therefore hold that a former adjudication on the question of the right to the custody of an infant child, brought up on *habeas corpus*, may be pleaded as *res judicata*, and is conclusive upon the same parties, upon the same state of facts: *Mercein v. People*, 25 Wend. 64; 35 Am. Dec. 653; *People v. Brady*, 56 N. Y. 182; Freeman on Judgments, sec. 324; Church on Habeas Corpus, sec. 387. In this case, the former adjudication pleaded in the return to the writ is admitted in the answer; and no new facts are alleged as having since occurred which alter in any material respect the rights of either party to the custody of the child. The parties are, in effect, the same; for although the alleged mother of the child was the sole relator in the former proceedings, while her husband (who is not the father of the child) now joins with her as relator, yet he can have no rights in the matter independently of his wife. If he has any rights, they must be wholly derived from and dependent upon those of his wife.

The motion of the respondent to discharge the writ is therefore granted.

WHEN JUDGMENT MAY BE PLEADED AS RES ADJUDICATA: See the extended note to *Lea v. Lea*, 96 Am. Dec. 775-783; *Harmon v. Auditor of Public Accounts*, ante, p. 502.

ORDER AWARDING CUSTODY OF CHILD ON HABEAS CORPUS, how far considered *res adjudicata*: See note to *State v. Smith*, 20 Am. Dec. 336.

HABEAS CORPUS BY PARENT TO OBTAIN CUSTODY OF CHILD: See the note to *Brooke v. Logan*, 2 Am. St. Rep. 183-187.

FRANKLIN v. WINONA AND ST. PETER R. R. Co.

[37 MINNESOTA, 409.]

RAILROAD COMPANIES. — IT IS DUTY OF RAILROAD COMPANY TO COVER BRIDGES AND CULVERTS on the line of its road within its yards, and within a reasonable distance of switches, wherever, in the proper performance of their duties, it would naturally and reasonably be anticipated that brakemen would be apt to go in making couplings.

MASTER AND SERVANT. — IF NEGLIGENCE OF MASTER COMBINES WITH NEGLIGENCE OF FELLOW-SERVANT, and the two contribute to the injury of another servant, himself free from negligence, the master is liable.

QUESTION FOR JURY. — Whether, under the facts of the particular case, it was the duty of the railroad company, in the exercise of ordinary care, to cover a certain culvert, was a question properly submitted to the jury.

APPEAL by the defendant from an order denying a new trial. The facts appear in the opinion.

Gordon E. Cole, for the appellant.

George B. Edgerton, and Kellogg and Eaton, for the respondent.

MITCHELL, J. The negligence charged against the defendant was leaving open and uncovered the spaces between the ties over a culvert, into which deceased, a brakeman on defendant's road, fell while making a coupling, and received injuries of which he died. The errors assigned and urged upon the argument may all be summed up in one, viz., that the evidence does not sustain the verdict, for the reasons, — 1. That no negligence on part of defendant was proved; 2. That it appears that the negligence of the deceased contributed to the injury complained of; but if not, 3. That it was caused by the negligence of his fellow-servants who were engaged with him in operating the train.

The whole case, in our opinion, turns upon the first of these three propositions, which is the only one about which we have had any doubt. It appears from the evidence that from the station of St. Charles eastward, on defendant's road, there is a steep up-grade, over which it is often difficult or impossible to draw heavy freight trains without dividing them, or what is called "doubling-up." From the top of this up-grade there is, going east, a sharp down-grade of about sixty feet to the mile for a considerable distance. To get freight trains going east from St. Charles over this up-grade by this "doubling-up" process, a spur siding was put in, the easterly end of which connected with the main track a short distance east of the top

of the hill. This point of junction was of course on the down-grade of the main track already referred to. The manner in which this "doubling-up" had been uniformly done was to divide the train at St. Charles, and take the front part up over the hill and back it on to the spur siding, leave it there, and return with the engine to St. Charles, and bring up the rear part of the train over the hill until within a short distance of the east end of the spur, and leave it standing there in charge of the rear brakeman, while the engine would cut loose, run ahead and back in on the spur, and bring out the front part of the train upon the main track, when the rear part would be let down to it, and the coupling made by the head brakeman, who leaves his station and descends to the ground for that purpose. The evidence also shows that when in these operations the front part of the train is pulled out from the spur on to the main track, it "usually" runs down, before coming to a stop, so that the hind end of it would be from two to six car-lengths (a car-length is about thirty-two feet) from the east end of the spur, and is liable sometimes to go still farther, depending on the condition of the rails and brakes, as the brakes may not hold the cars well, and they may get a "big start" on this down-grade. There is no direct evidence tending to show whether or not it is necessary or good management to let the front part of the train down so far from the switch before bringing it to a stop. The evidence also tends to show that when the rear part is let down upon the front part, it usually shoves the latter forward "one or more car-lengths." It also appears that it is not infrequent for the brakeman to fail to make the coupling on the first attempt, in which case it is necessary for the engineer to "slack ahead," and for the rear brakeman again to let down the rear part of the train, when the head brakeman would again attempt to make the coupling. The evidence shows that this mode of making a coupling is hazardous, and that it would be much safer to make it by backing the front part of the train to the rear part; but that with heavy trains it was often difficult and even impossible to back up so steep a grade, and that the couplings had always been made at this place in the way first described, and that the company had never issued any rules upon the subject.

About 305 feet east of the east end of the spur-track was the uncovered or open culvert already referred to. Two of the freight conductors of defendant testified that there is no

occasion or necessity for getting down as far as the culvert in coupling the train after doubling the hill. This is not contradicted by any direct or positive evidence, but the witnesses gave no reason for their opinion, except the fact that they had doubled the hill a great many times, and never got down as far as the culvert, except on one occasion, when both brakemen got off the train without the knowledge of the conductor, and it "got away from them."

On the occasion when the deceased was killed, he was employed as head brakeman upon a freight train which was being doubled over this hill in the manner already described. The rear part had been left standing on the main track, with its front end within sixty feet of the west end of the spur, and then the front part brought out from the spur onto the main track, and stopped with the rear end about two car-lengths below the switch, when the rear part of the train was let down slowly to it, the deceased being on the ground for the purpose of making the coupling. The front part of the train was held merely by the steam in the engine, and there is no direct evidence as to whether this was or was not proper railroading. When the two parts of the train came together, the deceased attempted to make the coupling, but failed. The shock brought the hind end of the front part of the train within about two or three car-lengths of the culvert. The deceased then signaled the engineer to slack ahead, which was done; and when the rear part was again let down, he stepped up and made the coupling, and while doing so took a step or two forward, and fell into the open culvert, was run over by the cars, and received the injuries of which he died.

The question is, whether reasonable care and prudence required the defendant to cover this culvert. In determining the question, we must assume as true every fact favorable to the plaintiff which the jury might fairly have found from the evidence; and if from these facts different minds might reasonably draw different conclusions as to defendant's negligence, that question would be one for the jury, and this court would not say that their verdict was not sustained by the evidence.

The general rule governing the duty of the defendant in the premises cannot perhaps be better stated than by adopting the language of one of the witnesses, viz.: "To cover bridges and culverts on the line of their road within the yards, and within a reasonable distance of switches, wherever brakemen

would be apt to go in switching and coupling cars." This is custom as well as duty, for the reason that an uncovered culvert would be a sure death-trap to brakemen while engaged in such work. By reason of some unforeseen accident or extraordinary occurrence, a coupling might in some instances have to be made at any place on the line of the road far distant from any yard or switch. But the company is not bound to anticipate any such unusual occurrence. Neither is it bound to take steps to guard its employees against the consequence of their own negligence. But wherever in the proper performance of their duties it would naturally and reasonably be anticipated that they would be apt to have to make these couplings, it is the duty of the company to cover its culverts and bridges.

The defendant contends that this mode of making couplings by letting the rear part of a train down upon the front part is dangerous, improper, and negligent, and that they should have been made by backing the front part up to the rear portion, and that the company was not bound to anticipate that the train-men would adopt so dangerous and negligent a practice. It is true that the evidence does show that this mode of making a coupling is attended with great danger, and that this particular train, not being a very heavy one, could have been coupled in the method suggested. But inasmuch as in case of many trains this could not be done, the defendant, by placing this spur at this place for the purpose stated, must be deemed to have not only authorized, but impliedly ordered, couplings to be made in the way universally practiced, and therefore bound to adopt proper safeguards for its employees with reference to such practice. If we were to indulge in surmises outside the evidence, we might conjecture that it might be bad railroading on the part of the train-men to permit the front part of a train, when brought out from the spur, to run six or more car-lengths from the switch before bringing it to a stop, or to leave it without brakes, to be held merely by the steam in the engine, so that the concussion with the rear portion of the train would shove it several car-lengths farther forward. But the evidence is, that this usually occurred, and there is at least no direct or positive evidence that this was the result of bad management.

Taking into consideration these facts, and keeping also in mind the total distance from the switch to the culvert, that this was a steep down-grade, and that in handling freight

trains, which are, as compared with passenger trains, heavy and somewhat unwieldy, being controlled by hand-brakes, train-men cannot be expected to calculate distances very accurately in moving them; and the further fact that frequently a brakeman would fail to make the coupling on the first attempt, when a second one would have to be made still farther down, —we think that the evidence in this case presented such a variety of somewhat peculiar circumstances that the jury might fairly find that it should have been reasonably anticipated that couplings would be liable to be made as far down as this culvert, and therefore that the railway company, in the exercise of ordinary care to protect its brakemen from danger, should have covered it. This view of the evidence is strengthened by the demonstrated fact that in this case the coupling was made at or near the culvert without the intervention of any unusual or extraordinary cause. We are therefore of opinion that the question of defendant's negligence was a question for the jury, and that we cannot say that their verdict is not supported by the evidence.

The defendant, however, contends that the evidence conclusively shows that deceased's own negligence contributed to the injury. Aside from the mode of making the coupling (which we have already disposed of), this contention is based solely upon the hypothesis that deceased either knew, or in the exercise of ordinary care ought to have known, of the existence and location of the culvert. There is ample evidence to show that he did not in fact know of it, and whether he ought to have known of it was, under the evidence, a question for the jury. He had been on the road only about a month. Unless something special had occurred to call his attention to it, he would not necessarily have occasion or opportunity to observe the culvert while merely passing over the road on his train. The evidence shows that sometimes a conductor would not have occasion for a month at a time to double up his train over this grade. There is no evidence that the train on which deceased was was ever doubled up there, except what is implied in the somewhat vague and indefinite testimony of the conductor Aldrich. And even if it had, deceased's attention might not have been called to the culvert, unless he had occasion to go down to it in making a coupling. The fact that he did not observe it or look out for it on the occasion on which he was killed, when his attention was necessarily intently

occupied in making the coupling, was certainly no conclusive evidence of negligence.

The further contention is made, that even if deceased was not chargeable with negligence, yet it conclusively appears that the conductor and engineer of the train well knew of the location of the culvert, and therefore their attempt to have the coupling made at that place was gross negligence, and this being the negligence of the fellow-servants of deceased, defendant is not liable. A sufficient answer to this is, that conceding that the negligence of the other train-men in this respect contributed to the injury, yet if the defendant was negligent in not covering this culvert (of which fact the verdict is conclusive), and this negligence proximately contributed to the injury, the defendant is liable. It is well settled that if the negligence of the master combines with the negligence of a fellow-servant, and the two contribute to the injury of another servant, himself free from negligence, the master is liable: *Cayzer v. Taylor*, 10 Gray, 274; 69 Am. Dec. 317; *Booth v. Boston and Albany R. R. Co.*, 73 N. Y. 38; 29 Am. Rep. 97; *Paulmier v. Erie R. R. Co.*, 34 N. J. L. 151; *Crutchfield v. Richmond etc. R. R. Co.*, 76 N. C. 320.

Order affirmed.

MASTER IS BOUND TO FURNISH SERVANT WITH REASONABLY SAFE PLACE IN WHICH TO WORK: *Lewis v. Seifert*, 2 Am. St. Rep. 631, and note; *Smith v. Peninsular Car Works*, 1 Id. 542.

IF NEGLIGENCE OF MASTER COMBINES WITH THAT OF FELLOW-SERVANT in producing injury, the master is liable to a servant who is himself free from negligence: *Faren v. Sellers*, 4 Am. St. Rep. 256.

WHETHER SERVANT WAS ACTING IN THE LINE OF HIS DUTY at the time of injury, so as to impose on the master the duty of protecting him, is a question for the jury: See *St. Louis etc. R'y v. Hendricks*, 3 Am. St. Rep. 220.

RICH v. CITY OF MINNEAPOLIS.

[37 MINNESOTA, 423.]

HIGHWAYS. — PUBLIC ACQUIRES IN STREET ONLY RIGHT OF WAY, with the powers and privileges incident thereto; and subject to this right, the soil and mineral belong to the owner of the fee. The public easement justifies only the taking of material which the process of the construction or repair of the street requires.

MUNICIPAL CORPORATION. — WHEN, ACTING WITHIN ITS GENERAL POWERS, a city makes a contract for the grading of a street, in which it is provided that the contractors, in consideration of doing the work, are to receive and appropriate to their own use all the stone in that part of the

street, and in pursuance of the contract they proceed to take out and dispose of the stone, they are the agents of the city in the premises, and the city is responsible for their acts.

HIGHWAYS. — ESTABLISHED PRESUMPTION OF LAW IS, that the owner of land abutting on a street owns also the fee in the street.

ACTION to recover the value of stone removed from a city street. The plaintiff owned the land abutting upon that part of the street from which the stone was taken, and the stone was taken by contractors engaged in grading the street, under a contract with the city.

Merrick and Merrick, for the appellant.

Seagrave Smith, for the respondent.

MITCHELL, J. It clearly appeared from the evidence introduced by plaintiff that the city of Minneapolis had no right to take these stones. It was not necessary to remove them for the purpose of grading or improving the street, as they were below the grade line. The public acquires in a street only a right of way, with the powers and privileges incident thereto. Subject to this right, the soil and mineral in a street belong to the owner of the fee, the same as if no street had been laid out. When the surface of the land is above grade line, so that in order to grade and improve the street it is necessary to remove superincumbent materials, this may be done, and probably such material may be used, if necessary, in improving other parts of the street; but the public easement justifies only the taking of material which the process of the construction or repair of the street requires: *Althen v. Kelly*, 32 Minn. 280; *Robert v. Sadler*, 104 N. Y. 229; 58 Am. Rep. 498.

The evidence also shows, or tends to show, that the city, acting within its general powers, made a contract with certain parties to grade the street, in which, among other things, it was provided that, in consideration of their grading the street, the contractors were to receive and be permitted to quarry, take away, sell, or use as their own, all the rock in this part of the street, and that, in pursuance of and under this contract they took out and disposed of the stone in question. Under these facts, the contractors were the agents of the city in the premises, and the city responsible for their acts: *Sewall v. City of St. Paul*, 20 Minn. 511.

If the plaintiff owned the land abutting on the street, he presumably owned the fee in the street, such being the established presumption of the common law: 3 Kent's Com. 432;

Thompson on Highways, 26, 27. Therefore, inasmuch as the evidence showed that the plaintiff owned the lots on both sides of the street, subject to certain reservations by his grantors, he presumably owned the stone in the street, unless covered by these reservations. This action being purely one for the value of the stone removed, and the evidence introduced being directed solely to that question, of course plaintiff could not recover unless he owned the stone. He acquired title to the lots on one side of the street from one Rogers. It appears that these lots were subject to a prior lease from Rogers to one Aronson, who had a right to remove the stone during the term of his lease, and was to pay Rogers a certain price therefor, but the date or duration of the lease was not proved. On the same day that Rogers conveyed to plaintiff, the parties executed a supplemental contract (exhibit D), in which it was agreed that whatever stone Aronson did not remove from the lots during the term of his lease, plaintiff was to pay Rogers for at the rate of thirty-five cents a perch. This agreement further provided as follows: "It is mutually agreed that all of the rock in and upon said lots is now and shall be the property of said Mary P. Rogers; and all moneys arising from the quarrying and sale of the same, under the mentioned lease to B. Aronson, shall be paid to her the same as if this sale (the conveyance of the lots) had never been made. In other words, the said Samuel M. Rich, in buying the lots mentioned, agreed that said Mary P. Rogers should retain the lease to B. Aronson, and all moneys arising therefrom, and all rock remaining in and upon said lots at the termination of said lease." This amounts clearly to a reservation of all the rock in the lots, which would include that to the center line of the street, subject to the public easement. The only possible interest which plaintiff could have in the rock was the obligation to take at a fixed price, at the end of the Aronson lease, whatever, if any, was left, and it did not appear that any such contingency had or ever would occur. The plaintiff therefore made out no right of recovery for the rock taken from that half of the street.

Plaintiff acquired the lots on the other side of the street under a conveyance from one Henry Downs, which contained the following reservation: "Excepting and reserving to the said Henry Downs, his heirs or assigns, the ownership to the stone embedded in said land, and the right to quarry and remove the same from Nicollet Street, adjoining said land, to a distance, at most, of twelve (12) feet into said street, before

August 1, 1887." This is somewhat obscure and ambiguous. If the first clause stood alone, it would undoubtedly amount to a reservation of the stone in all the land conveyed,—the street as well as the land outside the street line. But in the absence of any evidence of extrinsic facts tending to throw light on its meaning, we think that the fair construction of this reservation, and the only one that will reasonably give effect to the whole of it, is, that the term "said land" refers to the lots exclusive of the street, and that the first clause reserves merely the stone in the lots proper, and that the intention of the second clause was to reserve in addition the right to remove the stone out in the street the distance of twelve feet from the street line any time before August 1, 1887. As Nicollet Street is sixty feet wide, this would leave a strip eighteen feet wide, the stone in which, not being reserved, would pass by the deed to plaintiff, subject only to the rights of the public. For this much, at least, the plaintiff would be entitled to recover. It is true, he did not prove what proportion of the stone was taken from that strip; but he was, under the evidence, entitled at least to nominal damages. For this reason, the court erred in dismissing the action.

Order reversed.

PROPERTY IN HIGHWAY IS NOT IN PUBLIC, but is in the owner of the land over which it passes: *State v. Buckner*, 98 Am. Dec. 83; the public having only a right of way therein: *Stinson v. Gardiner*, 66 Id. 281; *State v. Buckner*, *supra*.

MUNICIPAL CORPORATION, IN GRADING STREET, has no right to carry away soil: *Delphi v. Evans*, 10 Am. Rep. 12; and see note 19, concerning the right to carry away stone which is within the limits of the street; but see, *contra*, *New Haven v. Sargent*, 9 Id. 360; *Bissel v. Collins*, 15 Id. 217, and note 219.

CHUBBUCK v. CLEVELAND.

[87 MINNESOTA, 466.]

FRAUD—LIABILITY FOR INJURY RESULTING TO THIRD PERSON FROM FRAUDULENT REPRESENTATIONS.—If false and fraudulent misrepresentations are made to one person, with the expectation that they should be communicated to and acted on by a third person, and they are so communicated to and acted on by him to his prejudice, the result of the fraud must be deemed to have been contemplated by the party first making such representations, and he is liable therefor.

ID.—WHERE SERVICE OF PROCESS IS PROCURED BY FRAUD, THAT FACT MAY BE SHOWN, and the court will refuse to exercise its jurisdiction,

and turn the plaintiff out of court. The law will not lend its sanction or support to an act, otherwise lawful, which is accomplished by unlawful means. The facts disclosing the fraud may be set up by answer.

Id. — **APPEARANCE BY ANSWER, WHICH SIMPLY PROTESTS AGAINST** the exercise of jurisdiction, and claims no other right, is not such an appearance as waives the objection.

Clapp and Macartney, and Ray S. Reid, for the appellant.

Fayette Marsh, for the respondent.

VANDEBURGH, J. The parties are residents of Wisconsin, and the defendant is the owner of a team alleged to be exempt under the laws of that state. This action was commenced by attachment issued out of the municipal court of the city of Stillwater, and levied on the team while temporarily in that city. The defendant answered by attorney, and at the trial the court ordered judgment for plaintiff upon the pleadings, and the defendant appeals from the judgment. It is alleged in the answer, in substance, that the plaintiff caused the attachment to be issued through the agency of one Kelly, acting for him, and levied on the team, and that he has ever since caused the team to be kept from the defendant; that defendant was induced to come over into the city with his team, by the deceit and false representations of Kelly, and with the purpose and object of effecting such levy; and that, while the property was so held under the first attachment, which Kelly and his attorney refused to release on defendant's solicitation, a second attachment, the one issued in this action, was caused to be levied on the property by plaintiff. The suit was commenced by attachment, and the defendant filed the answer as a plea in abatement of the action, on the ground that the jurisdiction of the court had been procured by fraud.

1. The different parts of the transaction are sufficiently connected to fix the responsibility upon the plaintiff, who, by insisting upon the enforcement of the attachment, ratifies and adopts the acts of his agent in procuring it.

2. The representations were not, as it appears, made directly to defendant, but to one McGuire, and were repeated to him, and "induced this defendant to come within the jurisdiction of this court, and that said Kelly made said representations for the sole purpose of getting this defendant within the jurisdiction of this court with his team." Defendant further alleges "that the false and fraudulent representations made by said Kelly consisted in the statements that he, said Kelly, had some coal in Stillwater that he would turn over to the

said McGuire, on account, if he would send a team after it, whereas, in truth and in fact, the said Kelly had no coal at said place, as he well knew, but that he made the said representation to the said McGuire, knowing, from the relations existing between the defendant and the said McGuire, that the latter would employ the defendant to go after it, and thus come within the jurisdiction of this court." The representations were therefore made with the expectation and purpose that they should be communicated to and acted on by the defendant; and the result of the fraud to defendant, as the one injured by it, must be deemed to have been contemplated by the guilty party: *Levy v. Langridge*, 4 Mees. & W. 337; *Jasigi v. Brown*, 17 How. 183; Bigelow on Fraud, 90.

3. Where the service of process is procured by fraud, that fact may be shown, and the court will refuse to exercise its jurisdiction, and turn the plaintiff out of court. The law will not lend its sanction or support to an act, otherwise lawful, which is accomplished by unlawful means: *Townsend v. Smith*, 47 Wis. 623; 32 Am. Rep. 793; Bigelow on Fraud, 166, 171, and cases; *Ilsley v. Nichols*, 12 Pick. 270, 276; 22 Am. Dec. 425; *Sherman v. Gundlach*, 37 Minn. 118.

4. The law will operate retrospectively to defeat proceedings fraudulently inaugurated, though done under the color of lawful authority, and hence we see no reason why the facts may not be pleaded in an answer, on the ground that the service of the process under which jurisdiction was obtained was unlawful. The party does not, in such case, waive his objection simply by setting up the facts disclosing it. As said by the court in *Townsend v. Smith*, *supra*: "Such a case is entirely unlike one where there has been a failure of proper service of process; for there the failure affects only the defendant, while here the fraud affects the integrity of the process of the court": *Larned v. Griffin*, 12 Fed. Rep. 590; *Gilbert v. Vanderpool*, 15 Johns. 242; 1 Wait's Practice, 562. An appearance by an answer which simply protests against the exercise of jurisdiction, and claims no other right, is not such an appearance as waives the objection: *Sullivan v. Frazee*, 4 Rob. (N. Y.) 616. Again, the objection, strictly, is not that the court has not jurisdiction of the person, but that it ought not, by reason of the alleged fraud, to take or hold jurisdiction of the action: *Wheelock v. Lee*, 74 N. Y. 495; *Higgins v. Beveridge*, 35 Minn. 285.

Judgment reversed, and case remanded for trial.

SERVICE OF PROCESS PROCURED BY FRAUD WILL BE SET ASIDE, and court will refuse to assume jurisdiction thereon: See note to *Steele v. Bates*, 16 Am. Dec. 723 et seq.

APPEARANCE FOR PURPOSE OF OBJECTING TO JURISDICTION will not give court jurisdiction of person if it had none before: *Wright v. Boynton*, 72 Am. Dec. 319, and note.

PHELPS v. WINONA AND ST. PETER R. R. Co.

[37 MINNESOTA, 485.]

NEGLIGENCE — EVIDENCE. — IN ACTION FOR DAMAGES RESULTING FROM DEFENDANT'S NEGLIGENCE IN OBSTRUCTING HIGHWAY crossing with snow thrown from the railroad track, causing the death of the plaintiff's intestate, evidence of the difficulties experienced by other travelers in attempting to make the crossing for some days prior to the accident, and while the highway was in substantially the same condition, is admissible, both to prove the unsafe condition of the highway, and also that this had continued so long as to charge the defendant with knowledge of the fact, and with negligence in not removing the obstruction. Evidence of what the deceased was worth at the time of his death is also admissible, for the purpose of showing the reasonable expectation of pecuniary benefit to his family from the continuance of his life.

EVIDENCE. — TO PROVE WHAT ONE IS WORTH, ANY PERSON HAVING KNOWLEDGE of his pecuniary affairs may testify. One who managed the settlement of his estate, and in that way acquired knowledge of his affairs, may testify thereto; and the fact that he acquired this knowledge, in whole or in part, from proceedings had in the probate court in due settlement of the estate, does not make his evidence secondary in its nature.

PRACTICE — DISMISSAL AFTER NEW TRIAL GRANTED. — After trial of action, and verdict for plaintiff set aside on motion of the defendant, and a new trial granted, the plaintiff has the same right to dismiss or discontinue as if no trial had ever been had. And after such dismissal or discontinuance, he may bring another action for the same cause of action, and is not estopped from alleging other or different facts from those alleged in the first action.

ID. — EFFECTIVE PART OF PLEA OF ANOTHER ACTION PENDING is, that the action is still pending, and this must be affirmatively proved.

APPEAL by the defendant from an order refusing a new trial. The facts appear in the opinion.

Wilson and Bowers, for the appellant.

B. S. Lewis, for the respondent.

MITCHELL, J. Action for damages resulting from defendant's negligence causing the death of plaintiff's intestate. The negligence charged was throwing snow from the railroad track upon the highway at a crossing, the bank formed by which on one side was highest at the south end, and on the

other side highest at the north end, thus rendering the highway impassable on the usual traveled track, and compelling travelers to enter the cut at the end where the bank was lowest on that side, and then follow the railroad track to a point at which they could get out on the opposite side; that this state of things had, to the knowledge of defendant, continued for several weeks, without its removing the obstruction; that while deceased, traveling the highway with a team, was on the railroad track making the crossing in the manner indicated, defendant's train, running at a very high rate of speed, and without any whistle being blown or bell rung, to warn the travelers at the crossing, ran over and killed him. The defendant, as its first defense, denied negligence on its part, and alleged contributory negligence on part of the deceased.

1. Defendant's first, third, and fourth assignments of error are the admission of evidence tending to show the unsafe and impassable condition of the highway for some days prior to the accident, and the difficulties experienced by other travelers in attempting to make the crossing. There was evidence tending to show that the highway was in substantially the same condition during this time as on the day of the accident, except that the obstruction was increased by additional snow being thrown out from the railroad track. As to the materiality and competency of this evidence there is no room for doubt. It was admissible both to prove the unsafe condition of the highway, and also that this had continued so long as to charge defendant with knowledge of the fact, and with negligence in not removing the obstruction. These matters were in issue under the pleadings, and also, as appears from the bill of exceptions, under the evidence. The defendant especially complains, in this connection, of the fact that the witness Barber was permitted to testify somewhat in detail of the difficulties which he experienced in attempting to cross on the morning of the day of the accident, and also on the day previous, describing what he did, and the efforts he made to get across with his team. Proof of the fact that other persons were unable to cross, and of the efforts they made to do so, was competent for the purpose of showing the obstructed and unsafe condition of the highway. It is analogous in principle to cases where evidence of similar accidents is admitted to show that the common course was in an unsafe condition. It is the practical test of common experience, often the most satisfactory evidence: *Phelps v. City of Mankato*, 23 Minn. 276;

Kelly v. Southern Minnesota R'y Co., 28 Id. 98; *Morse v. Minneapolis etc. R'y Co.*, 30 Id. 465, 471; *Kolsti v. Minneapolis etc. R'y Co.*, 32 Id. 133; *Darling v. Westmoreland*, 52 N. H. 401; 13 Am. Rep. 55; *Kent v. Town of Lincoln*, 32 Vt. 591.

2. The fourth assignment of error is, that plaintiff was allowed to ask a witness what the deceased was making the journey for, his answer being that it was to get some medicine for his wife. Whether material or not, we do not see that defendant could have been prejudiced by this evidence. The presumption is, that he was traveling the highway for a proper purpose. There is nothing in the record to indicate that there was any question of fact at issue under the evidence upon which this testimony could have had any effect prejudicial to the defendant.

3. The fifth, sixth, and seventh assignments of error are the admission of certain evidence tending to show what property the deceased had when he came to the state some twenty years before, what occupation he had followed, how much he had accumulated, and what he was worth at the time of his death. This was clearly admissible for the purpose of showing the reasonable expectation of pecuniary benefit to his family from the continuance of life: *Shaber v. St. Paul etc. R'y Co.*, 28 Minn. 103; *Opsahl v. Judd*, 30 Minn. 126. To prove what a man is worth, as in the somewhat analogous case of proving his solvency or insolvency, it is not necessary to produce the title papers for his property, or the records of conveyances to him. Any person who is conversant with the facts, and who has knowledge of the existence and ownership of his property, may testify. One who managed the settlement of his estate after his death, and in that way acquired knowledge as to what property he had, and what he owed, may testify as to those facts. The fact that he acquired this knowledge, in whole or in part, from proceedings had in the probate court in the settlement of the estate does not make his evidence secondary in its nature. All the witnesses interrogated on this subject had more or less personal knowledge of the deceased's property and pecuniary affairs, and hence were qualified to testify. The point made that the witness Murphy testified merely as to what deceased told him is not borne out by the record. His testimony as to what property deceased had at the time inquired about appears to have been based on what he saw while working for him or while residing in the neighborhood.

4. The eighth assignment of error is the exclusion of evidence in support of defendant's second defense. This defense is, in substance, that plaintiff had brought a former suit for the same cause of action, in the complaint in which she had alleged the circumstances under which the deceased was traveling on the railroad track at the time of the accident differently from those alleged in this action; that she went to trial on the complaint, and recovered a verdict, which on motion of defendant was set aside, and a new trial granted, on the ground that the deceased had no right to travel on the track under the circumstances as alleged in the complaint, and that in doing so he was guilty of contributory negligence; that thereupon plaintiff moved the court for leave to amend her complaint, so as to allege the facts as now alleged in the complaint in the present action; that the court refused to allow her to amend, for the reason that she must have known the facts prior to going to trial, and that, having seen fit to go to trial on the complaint as it was, she ought not now to be allowed to make a change of base; that thereupon she "dismissed, or claimed to have dismissed," that action, and then brought the present one, alleging as the grounds for recovery the same facts as in the first action, except as varied by the facts which she had unsuccessfully sought to set up by way of amendment to her first complaint. "Wherefore defendant claims the plaintiff is estopped from maintaining an action or recovering against defendant in this suit on a position or on grounds inconsistent with those set up as her right of action in the first suit, and that it would be inequitable to permit her to take such an inconsistent position after she had, with full knowledge of all the facts, alleged and brought evidence, and sought to recover on different and inconsistent grounds."

This defense is to us a novel one, and the fact that counsel of such ability and usual perspicuity fail to make clear on what legal principles they claim it to rest confirms us in the opinion that there is nothing in it. We think the mere statement of the facts is enough to show that they constitute no defense. Whatever probative force this "change of base" may have to prove that it is an afterthought, and not true in fact, the facts alleged do not contain the first element of estoppel. We have found no case, and have been referred to none, to support the proposition that, after a party has dismissed or discontinued a suit, he may not bring another for the same cause of action, with different allegations in his pleading as

to the facts on which he predicates his right of recovery. His laches may be good ground for a court in its discretion to refuse to allow him to amend his pleading in the first action; but that being discontinued, there is nothing to prevent him from bringing a second action, and framing his pleading as he pleases. Cases such as *Railway Co. v. McCarthy*, 96 U. S. 258, cited by counsel, are not at all in point. That was a case where the railway company refused to ship cattle solely and expressly on the ground of want of cars. When sued for breach of contract, they set up as a defense the illegality of making shipments on Sunday. The court very properly held that, having placed their refusal to perform a contract or duty exclusively on one ground, they cannot, when sued, shift their position, and place their refusal on some other ground.

This defense was evidently set up, not as a former adjudication, but in the nature of an estoppel by conduct which should prevent plaintiff from recovering on an alleged state of facts different from or inconsistent with those alleged in the first action. But on the argument it was urged that the dismissal of the first action was a determination on the merits; that one trial being had, it was not a dismissal "before trial" within the meaning of the General Statutes of 1878, chapter 66, section 262. This is clearly untenable. The award of a new trial wipes out the verdict. Setting aside a verdict is as if it had never been, and it cannot be used for any purpose. It is a mistrial, and the plaintiff has the same right to dismiss or discontinue as if no trial had ever been had: *Edwards v. Edwards*, 22 Ill. 121; *Hilliard on New Trials*, 74; *Hidden v. Jordan*, 28 Cal. 301; *City of Winona v. Minnesota R'y Const. Co.*, 27 Minn. 415. Cases arising under the federal "removal acts" are, in view of their manifest purpose, as well as of their peculiar language, not much in point in this case on either side. The court was, therefore, in our opinion, right in excluding all evidence under the second defense, because it did not state facts constituting any defense.

5. The third defense was a plea of a former suit pending for the same cause of action, and the exclusion of evidence alleged to have been offered in support of this defense constitutes the ninth and last assignment of error. The record shows that, in support of the second defense, defendant offered *seriatim* the summons, pleadings, verdict, motion papers for a new trial, the order and decision of the court on that motion, the motion papers of plaintiff for leave to amend her com-

plaint, and the order and decision of the court thereon in the first action already referred to, which were all excluded by the court; that defendant then, without stating the object for which the offer was made, offered the same papers altogether, and the rejection of them is the error complained of. In view of the circumstances under which the offer was made, there was nothing to suggest to the mind of the court that it was made in support of the third defense. On the contrary, the natural inference would be, that counsel was simply fortifying his position in support of his second defense by reoffering the same papers in mass, especially as these were files and records in the very action which defendant had alleged that plaintiff "had dismissed or attempted to dismiss." If counsel reoffered the papers for another and different purpose, he should, under the circumstances, have so stated. But for another reason, there was no prejudicial error in excluding them. No other evidence was offered in support of the third defense. If admitted, the evidence offered would have been utterly insufficient to prove the pending of another action. The effective part of such a plea is, that the action is still pending. This must be affirmatively proved. The evidence offered would have simply proved that such an action had been commenced, but while lawsuits are sometimes very protracted, yet we apprehend that there is no presumption of law that a suit once begun is still pending until the contrary appears.

Order affirmed.

EVIDENCE OF SIMILAR ACCIDENT IS ADMISSIBLE in action for injury from obstruction in highway: *Phillips v. Willow*, ante, p. 114; *Cleveland etc. R'y Co. v. Wynant*, ante, p. 644.

ABATEMENT OF ACTION BY PLEA OF FORMER ACTION PENDING: See the extended note to *Smith v. Lathrop*, 84 Am. Dec. 452 et seq.

ROCKWOOD v. DAVENPORT.

[87 MINNESOTA, 533.]

JUDGMENT. — THERE CAN BE NO JUDGMENT CAPABLE OF BEING DOCKETED, or enforced in any manner, till it is entered in the judgment-book; and a docketing without such entry is of no avail, although a judgment roll, containing a purported copy of a judgment in it, has been made up and filed. The clerk cannot, in such case, lawfully enter the judgment *nunc pro tunc* without the order of the court; but a refusal to grant a temporary injunction to restrain the clerk from entering the judgment *nunc pro tunc* is not beyond the sound legal discretion of the court, and is not necessarily error.

ACTION to restrain the defendant, clerk of the district court, from entering certain judgments in the judgment-book, and appeals from an order denying a temporary injunction. The plaintiff was the assignee in insolvency of one Baker, and the defendant entered in the judgment docket the record of what purported to be judgments of the court against Baker. At the time of such docketing, no judgments had been entered in the judgment-book; but judgment rolls containing a copy of the judgments had been made up and filed

A. B. Jackson, for the appellant.

Dobbin and Hanley, for the respondent.

GILFILLAN, C. J. General Statutes of 1878, chapter 66, section 273, reads: "The judgment shall be entered in the judgment-book, and specify clearly the relief granted or other determination of the action." By section 275 the clerk is required, "immediately after entering the judgment," to attach and file, as the judgment roll, certain papers, among them a copy of the judgment. Section 277 provides for docketing the judgment "on filing the judgment roll." These acts follow in regular sequence: 1. The entry of the judgment; 2. The making up and filing the judgment roll; 3. The docketing. To support either a judgment roll or docketing, there must be a judgment entered. As this court said in *Williams v. McGrade*, 13 Minn. 46: "If a copy of the judgment constitutes a part of the judgment roll, the original must exist." There can be no judgment capable of being docketed or enforced in any manner till it is entered in the judgment-book. Until that is done, it does not matter that the party is entitled to judgment, either by default of defendant, or upon a decision or direction of the court. It has frequently been decided that an order or direction for judgment by the court, or by a referee, is not a judgment so that an appeal can be taken from it. That to constitute a judgment it must be entered in the judgment-book, as the statute directs, has always been held by this court: *Brown v. Hathaway*, 10 Minn. 303; *Williams v. McGrade*, 13 Id. 46; *Washburn v. Sharpe*, 15 Id. 43 (63); *Hodgins v. Heaney*, 15 Id. 142 (185); *Thompson v. Bickford*, 19 Id. 17; *Hunter v. Cleveland Stove Co.*, 31 Id. 505.

The filing of the roll and docketing in this case, there being no judgment to authorize them, were of no avail. The omission of the clerk to enter the judgment before performing those acts was apparently a gross violation of official duty.

Whether the court, with the proper parties before it, and upon a proper showing, might direct the clerk to enter the judgment *nunc pro tunc*, we need not consider. Certainly the clerk cannot lawfully do it without such order. But although the unauthorized act of the clerk in entering judgment as of the date of the docketing would put an apparent cloud upon plaintiff's title, yet, as the granting a temporary injunction rests in the sound legal discretion of the court, the refusal to grant it was not necessarily error. The plaintiff does not lose any right by the refusal. If the judgment be entered *nunc pro tunc*, he has his remedy against the party claiming under it; and in the prosecution of that remedy both of the parties interested would be before the court, instead of there being but one of them, as is the case here. To refuse the temporary injunction when such a ground for it exists is not beyond a sound legal discretion.

Order affirmed.

ENTRY OF JUDGMENT *NUNC PRO TUNC* is the subject of the note to *Ninck v. Clark*, 4 Am. St. Rep. 828 et seq.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

BENNETT v. STATE.

[24 TEXAS APPEALS, 73.]

WITNESS, IMPEACHMENT OF. — Before a party can impeach his own witness, under the Texas statute, some statement must have been made by such witness injurious to the cause he was called to testify in behalf of. It is not sufficient that the witness makes a statement different from what the party calling him had reason to believe, and did believe, he would make, if the statement made is not injurious.

WITNESS, IMPEACHMENT OF — SURPRISE. — A party *bona fide* surprised at unexpected testimony of his witness may ask the witness as to his previous declarations alleged to have been made by him inconsistent with his testimony, with an object to probe his recollection, and lead him, if mistaken, to review what he has said, or to explain the attitude of the party calling the witness. But when the sole object is to discredit the witness, such testimony will not be received.

PARDONED WITNESS — COMPETENCY — CREDIBILITY. — Party who has been convicted of a felony, and afterwards fully and legally pardoned, is a competent witness, but the record of his conviction may be put in evidence against him as affecting his credibility, and counsel has the right to comment upon his credibility when addressing the jury.

INDICTMENT for cattle-stealing.

Poindexter and Padelford, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. By article 755, Code of Criminal Procedure, it is provided that "the rule that the party introducing a witness shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner, except by proving the bad character of the witness."

On application of this change in the rule to any particular case, the question is, Did the witness state facts injurious to the party calling him as a witness: *Tyler v. State*, 13 Tex. App. 205; *Thomas v. State*, 14 Id. 70. In other words, before the right accorded by the statute can be availed of, some statement must have been made by the witness injurious to the cause he was called to testify in behalf of. It is not sufficient that the witness makes a statement different from what the party calling him had reason to believe, and did believe, he would make, if the statement made is not injurious.

By the bill of exceptions in this case it is shown that the prosecution had placed one Hardy Kyle on the stand as a witness for the state, and on his direct examination he stated: "I never heard defendant say anything about the Sparks yearling." This is in full all the statement made by him. Does it appear that this statement was injurious to the state or any one else? If so, then any negative answer to a question propounded where an affirmative was desired, and *vice versa*, might be claimed to be injurious.

After the witness had so stated, over objection of defendant, the court permitted the prosecution, with avowed purpose, to first lay a predicate, and then introduce evidence to impeach its witness by proving that said witness had on another occasion stated to counsel for prosecution "that defendant had tried to hire him [witness] to go before the grand jury and testify for him in this case, and that he had offered to hire him to testify before the jury, and that he was so drunk when before the grand jury that he did not know what he then swore."

In our opinion, a proper and sufficient case in which the impeachment of one's own witness would be allowable is not established by the facts shown. A case of surprise at testimony other than that expected and calculated upon is perhaps shown. But there is a well-defined difference in the rules with reference to surprise and impeachment. "A party *bona fide* surprised at the unexpected testimony of his witness may be permitted to interrogate the witness as to his previous declarations alleged to have been made by the latter, inconsistent with his testimony, the object being to probe the witness's recollection, and lead him, if mistaken, to review what he has said. Such corrective testimony is also receivable to explain the attitude of the party calling the witness. But when the sole object of the testimony so offered is to discredit the witness, it will not be received": *White v. State*, 10 Tex. App. 381, quoting from 1 Wharton's Ev., sec. 549.

The ruling complained of was erroneous, and it can be readily imagined how the testimony admitted to impeach the state's witness, Kyle, even had it been pertinent to the issue raised, which is not made apparent, was most prejudicial to the rights of this appellant.

Before finally disposing of the case, it may be well to consider the third bill of exceptions, which, in so far as we are advised, submits a question never heretofore adjudicated in this state. When defendant called his father, Richard Bennett, as a witness, he was objected to by the state, because of incompetency, in that he had been convicted and incarcerated in the penitentiary for a felony: Pen. Code, art. 730, subd. 5. To this the defendant replied that the witness had been legally pardoned for said offense, and produced the governor's full charter of pardon. The objection was properly overruled, and the witness testified. Afterward, in argument to the jury, when counsel for the prosecution were insisting that, notwithstanding the pardon, the witness was entitled to no credit on account of his former conviction, defendant objected to such line of argument as illegal and unwarranted, and asked the interposition of the court to arrest and prevent it. This the court declined to do, and in his explanation to the bill of exceptions the learned judge says: "If the witness had been convicted of a felony and pardoned, it went to his credibility as a witness, and the jury had a right to know the character of the witness before them, and the attorney had the right to comment upon the credibility of the witness."

With regard to the general effect of a pardon, the accepted doctrine is, that a full pardon absolves the party from all legal consequences of his crime; it makes the offender a new man; it blots out his offense, and gives him a new credit and capacity, and even so far extinguishes his guilt as that, in the eye of the law, the offender is as innocent as if he had never committed the offense: *Hunnicut v. State*, 18 Tex. App. 499; 51 Am. Rep. 330; *Carr v. State*, 19 Tex. App. 635, and authorities collated and cited. Notwithstanding this comprehensive doctrine, it seems equally well settled that, whenever the pardoned convict is presented as a witness, the judgment of his conviction may be put in evidence against him. Mr. Wharton says: "But a pardon does not preclude such conviction from being put in evidence"; and in support of his text he cites in the note a long array of authorities of the highest standing: Wharton's *Crim. Ev.*, 8th ed., sec. 489, taken from the opinion

in *Curtis v. Cochran*, 50 N. H. 244. In that opinion it is said: "A pardon is not presumed to be granted on the ground of innocence or total reformation. [Citing authorities.] It removes the disability, but does not change the common-law principle that the conviction of an infamous offense is evidence of bad character for truth. The general character of a person for truth, bad enough to destroy his competency as a witness, must be bad enough to affect his credibility when his competency is restored by the executive or legislative branch of the government." Mr. Greenleaf seems to think that a pardoned felon who has served his full term in the penitentiary "would be entitled to very little credit": 1 Greenl. Ev., 13th ed., sec. 377.

Mr. Starkie says: "And although a pardon cannot convert a wicked man into an honest one, and confer credibility upon one who through the infamy of his conduct is not credible, yet such a pardon must be presumed to have been conferred after inquiry, upon good and sufficient ground, on an object worthy of the indulgence, and therefore worthy of being heard, but the degree of credit is still to be left to the jury": 1 Starkie's Ev., 7th Am. ed., 99.

It was held in *Baum v. Clause*, 5 Hill, 196, that "though the pardon of one convicted of felony will in general restore his competency as a witness, yet the conviction may still be used to affect his credit."

In the light of these authorities, the action of the court in the premises, complained of in the third bill of exceptions, was not erroneous. Other errors presented will not be noticed, because they may not arise on another trial. Because of the error in the first matter discussed, the judgment is reversed, and the cause remanded for a new trial.

HOW AND WHEN PARTY MAY IMPEACH HIS OWN WITNESS, on the ground of surprise: *Burkhalter v. Edwards*, 60 Am. Dec. 744, and note 751; when witness testifies to what the party calling him believes to be untrue: *Olmstead v. Winsted Bank*, 85 Id. 261, note 264; when the testimony is prejudicial to the party calling the witness: *Champ v. Commonwealth*, 74 Id. 388, and extended note 398. In *Cox v. Eayres*, 45 Am. Rep. 583, it is said that a party cannot show that his own witness has made statements out of court contradictory of his testimony.

EFFECT OF PARDON TO RESTORE WITNESS TO COMPETENCY: See the note to *Smith v. McIntire*, 59 Am. Dec. 580, 581. A pardon subject to revocation does not restore a witness to competency: *Carr v. Smith*, 53 Am. Rep. 395, and note; *People v. Bowen*, 13 Id. 148.

WHITE v. STATE.

[24 TEXAS APPEALS, 231.]

CRIMINAL LAW. — **INDICTMENT CHARGING THEFT** of the property of a corporation must describe the corporation by its corporate name in full, and must also allege that it is incorporated.

E. W. Terhune, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. Appellant was convicted upon an information based upon a complaint charging him and one Martin jointly with the theft of one hundred and fifty pounds of stone coal, of the value of sixty-seven and one half cents. In the complaint it is alleged the coal "was the property of the Mo. P. Rway Company," and that it was taken "from the possession of Burt Temple, who was holding the same for the said Mo. P. Ry Company, without the consent of the said Burt Temple and the said Mo. P. Ry Company, or either of them, and with the intent to deprive the said Mo. P. Rway Company of the value thereof," etc.

In the information the alleged owner is styled "the Mo. P. Ry Company," and this is the name used throughout to designate the owner. A motion to quash, which was overruled, raised two objections to the information, in substance: 1. That there was a fatal variance between the allegations in the complaint and the information as to the name of the owner; and 2. That neither the complaint nor information describes the owner sufficiently; and that if the letters used be sufficient to designate the Missouri Pacific Railway Company, as seems to have been intended, then the allegation is further defective and insufficient in that it does not allege that said railway is a corporation duly incorporated.

As to the complaint, we think that its allegations were inconsistent and repugnant in themselves. It alleges the ownership to be in "the Mo. P. Rway Company," but that the property was taken from, without the consent of, and with intent to deprive "the Mo. P. Ry Company" of the value of the same. Now, do the letters "Mo. P. Rway" and "Mo. P. Ry" designate the same company? It is extremely uncertain whether they do or not. If they do not, then the ownership is in a company whose want of consent to the taking is not alleged, and the want of consent and intent to deprive are made to apply to a party or company which did not own the

property. To say the least of it, the pleading is vague and indefinite; and few better illustrations, perhaps, could be given of the importance and necessity of stating in full without abbreviation, unless explained in connection therewith the name of the company or corporation intended to be designated. If initials can be held sufficient, then which of the two forms of initials set forth in the complaint shall we take as the true one? If we select "Mo. P. Rway" as the owner, then it is apparent that it does not correspond with and that there is a variance in letters between it and the "Mo. P. Ry," alleged as owner in the information.

The matter may be solved by determining whether, in a criminal prosecution, the name of a company or corporation should be set out in full, and if a corporation, whether it be further essential that it be alleged that it was incorporated. We have no special criminal statute upon the subject. Our statute as to the allegation of the name of the defendant, or of any other person necessary to be stated in the indictment, evidently refers to individuals, and does not embrace companies or corporations: Code Crim. Proc., art. 425. In short, our code of procedure is silent; and having failed to supply us a rule, we are relegated to the common law: *Id.*, art. 27, and approved precedents.

Mr. Bishop says: "An indictment against a corporation properly describes it by its corporate name." And again: "The indictment should show on its face that a name in it is a corporation's, if such in fact": 1 Bishop's Crim. Proc., 3d ed., sec. 682. In his work on criminal pleading and practice, eighth edition, Mr. Wharton says, in section 110: "When the name of a corporation is given, the corporate title must be strictly pursued, unless specification is made unnecessary by local statute"; and in a note to this section he says: "Whether at common law, in an indictment for stealing the goods of a corporation, it is requisite to aver that the corporation was incorporated, has been much disputed. That it is necessary is ruled in *State v. Mead*, 27 Vt. 722; *Cohen v. People*, 5 Park. Cr. 330; *Wallace v. People*, 63 Ill. 451; *People v. Schwartz*, 32 Cal. 160." He cites a number of decisions to the contrary, which we omit.

In his work on criminal law, the same learned author says: "Goods belonging to a corporation must be laid as the property of the corporation by its corporate name, and not as the property of the individual corporators, though they be all

named": 1 Wharton's Crim. Law, 8th ed., sec. 941. In 2 Archbold's Criminal Pleading, 359, it is said: "The property of a corporation aggregate must be laid in the corporation in its corporate name"; and this same doctrine is declared in 2 Russell on Crimes, 100.

In regard to pleading in civil cases, it is provided by statute that the act of incorporation need not be set out at length, "but it shall be sufficient to allege that such corporation was duly incorporated": Rev. Stats., art. 1190, amended by act 18th Legislature, regular session, p. 103.

This question, in so far as we are aware, has arisen, even incidentally, in but one case which has been adjudicated in the courts of last resort in this state. In *Price's Case*, 41 Tex. 215, the defendant was indicted for the theft of a bale of cotton from the train of the Houston and Texas Central Railroad Company, being property of said company. It was objected that the proper name of the company was the Houston and Texas Central Railway Company. Roberts, C. J., says: "It was not necessary to set out the charter in the indictment, or to allege it to be a chartered company otherwise than by name, as was done in this case." As shown by the authorities we have quoted above, this decision was not in harmony with the most approved doctrine, in so far as it holds that it is unnecessary to allege that the company is a corporation. We are of opinion that such allegation is requisite, and to say the least of it, it is beyond doubt the better practice.

But in this case certain initials only are given, and the name of the company is not pretended to be, or even substantially given, as might, with some plausibility, have been claimed in the *Price* case. How can this court say what the Mo. P. Rway Company is?

We are of opinion, for the reasons given, that both the complaint and information are insufficient to support the prosecution and conviction. Wherefore the judgment is reversed, and the prosecution under said complaint and information is dismissed.

INDICTMENT CHARGING CRIME AGAINST A CORPORATION must distinctly allege the fact of incorporation: *Staadon v. People*, 25 Am. Rep. 833.

AM. ST. REP., VOL. V.—56

TILLERY v. STATE.

[24 TEXAS APPEALS, 251.]

CRIMINAL LAW. — Self-defense is fairly raised by the evidence, and should be submitted to the jury, where it clearly appears that deceased, for some time previous to the homicide, had been at enmity with defendant; had repeatedly, and apparently without reasonable or probable cause, charged defendant with felony; had threatened to take his life; had actually conspired, and was conspiring at the time of the homicide, to kill him, at which time the deceased met defendant and again accused him of felony, was asked to retract, when he turned towards defendant, and placed his hand to his right side as if to draw a pistol, and where his pistol was afterwards found, when defendant shot and killed him.

CRIMINAL LAW — SELF-DEFENSE. — It is ERROR, when charging the jury, to make the right of self-defense hinge on the fact as to whether defendant “honestly” believed, at the time he acted, that he was in danger of losing his life. The correct rule is, that if it “reasonably” appeared to him, from his standpoint, and from the circumstances, that danger existed, and he acted under such reasonable belief, he was justified in defending, to the same extent, and under the same rules permitted, in case the danger had been real.

CRIMINAL LAW — SELF-DEFENSE — ERRONEOUS INSTRUCTION. — When court is instructing in relation to self-defense, and the claim of self-defense is partly based on threats made by deceased against defendant, the charge relating to the whole matter should be given in a connected manner; to disconnect one portion from the other is error.

CRIMINAL LAW. — LAW OF SELF-DEFENSE, when invoked by proof, should be given to the jury plainly, directly, connectedly, and affirmatively, and in such manner as to show its applicability to the facts in evidence.

CRIMINAL LAW — OPINION EVIDENCE. — Witness must state facts within his knowledge, and cannot state his conclusions. So held in a murder case, where the witness was asked if, from an investigation made by him about a charge of arson, he had found any evidence tending to connect defendant with it.

CRIMINAL LAW. — DECLARATION OF Co-CONSPIRATOR with deceased in seeking to kill defendant, made some time after the homicide, is not part of the *res gestæ*, and therefore inadmissible.

ARGUMENT OUTSIDE OF RECORD, about matters wholly foreign to the case on trial, and without any support in evidence, and calculated to operate prejudicially to defendant upon the minds of the jury, if allowed by the court under objection, is error sufficient to reverse the judgment.

J. M. Duncan, Alex Pope, R. C. De Graffenreid, and T. M. Campbell, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. 1. There can be no question but that the evidence in this case fairly and fully raises the issue of self-defense. It clearly appears that the deceased had, for some time previous to the fatal rencontre, been at enmity with the defendant; had repeatedly, and apparently without reason-

able or probable cause, charged the defendant with the crime of arson; had threatened to take the life of the defendant; had actually conspired with one Tabler to take defendant's life, and was acting together with said Tabler at the very time of the homicide, in pursuance with and in furtherance of said conspiracy. He and Tabler also endeavored to induce others to enter into said conspiracy with them, under the guise and protection of an oath-bound, secret organization called a "vigilance committee."

On the night before the homicide, at the instance of the deceased and Tabler, a meeting of this "vigilance committee" was held at the residence of deceased, at which it was proposed and urged by deceased that the committee should proceed at once, on that very night, to execute the defendant, but none of the committee present would agree to this proposition except Tabler. Early on the next morning, just before the homicide, deceased went to his place of business, and through the telephone summoned Tabler to his presence. Tabler responded promptly, and the two had a private conference. Very soon after this conference, the deceased, mounted upon his horse, and armed with a six-shooter, rode up by the side of defendant, who was riding along a street in the town of Longview, and after accosting him, again accused him of the crime of arson, and it was here that he received the fatal shot at the hands of the defendant.

We do not think it can be doubted, from the evidence before us, that the deceased and Tabler had resolved upon taking the life of the defendant at the first favorable opportunity; that they were prepared for and seeking such opportunity; and that, on the occasion of the homicide, the deceased provoked the difficulty which resulted in his death, with the intention at the time of killing the defendant. By the evidence, we are fully informed of the condition of the mind of deceased towards the defendant, and as to his intentions and design to wreak vengeance upon him in a deadly manner. He is surrounded by a halo of light, discovering his malice and inward intention, and illustrating his acts.

How stands the case with the defendant? His presence in town in the early morning is satisfactorily accounted for; he was there on a matter of business with the county judge. At home he left a sick wife with an infant only one week old. He has attended to his business with the county judge, and, mounted upon an inferior pony, is traveling along a public

street. On the night previous, he had been informed that the deceased had threatened on that very night to "fix" him before the next morning. He was well aware of the bitter enmity of the deceased towards him, although he may not have known of the conspiracy between deceased and Tabler to take his life. He was armed with a pistol, and in view of the threat which had been communicated to him the night previous, it cannot be said that the fact of his being thus armed indicated anything more than that, should occasion require, he would defend himself against the threatened danger. There is nothing whatever in the evidence to indicate that he was seeking a difficulty with the deceased. Under these circumstances, the deceased rode up from behind, beside the defendant, and accosting him, accused him again of the crime of arson. Defendant responded that he must retract the charge. Just then, one witness testifies, the deceased, who had ridden a little in advance of the defendant, turned in his saddle towards defendant, and placed his right hand to his right side as if to draw a pistol, when the defendant fired and shot him. A pistol was found on the body of deceased, on his right side, about where the witness saw him place his right hand. Upon this evidence, the trial judge very properly submitted to the jury the issue of self-defense.

It is earnestly contended, however, by counsel for the defendant, that the charge upon said issue is imperfect, erroneous, and prejudicial to the defendant, and should have been supplied and corrected by special instructions requested by the defendant. Considering the charge on self-defense with reference to the evidence bearing upon that issue, we are of the opinion that the objections urged to it are substantial and tenable. There is not a particle of evidence fairly raising the issue that defendant had forfeited the right of self-defense by seeking and provoking the difficulty, and it was erroneous and prejudicial to the defendant to submit that issue to a jury.

In instructing the jury upon the law of apparent danger, the charge makes the right of self-defense hinge upon the fact as to whether or not the defendant honestly believed at the time he acted that he was in danger of losing his life, etc. This idea of honest belief on his part is presented three several times in the charge upon self-defense; and, while being subject to the objection that it is made too prominent to the minds of the jury, is besides not a correct statement of the law. The correct rule is, that if it reasonably appeared to

the defendant, from his standpoint, from the circumstances of the case, that the danger existed, and he acted under the reasonable belief that it did exist, he was justified in defending against it to the same extent and under the same rules permitted in case the danger had been real: Willson's Texas Criminal Laws, sec. 978. While it may be abstractly correct to require that the defendant's belief of the existence of danger should be an honest one, it is going too far, we think, to so instruct the jury, especially when such instruction is repeated so often, and especially, too, in view of the evidence in this case.

Another serious objection to the charge is, that in instructing the jury in relation to threats made by the deceased against the defendant, this portion of the charge is disconnected from that portion relating to self-defense, when it formed a part of the law of the issue of self-defense, and should have been given in immediate connection therewith. In the position in which the instruction as to threats appears in the charge, the jury might reasonably have concluded that it had no connection with the issue of self-defense, and the effect may have been that, in considering that issue, the jury entirely ignored the legitimate bearing of the threats thereon. The law of self-defense, when invoked by the proof, should be given to the jury plainly, directly, connectedly, and affirmatively, and in such manner as to show its applicability to the facts in evidence.

In this case, the facts in proof upon the issue of self-defense are not complicated, and a plain, direct, affirmative explanation of the law applicable thereto should have been given. We do not think the court gave such a charge, and the failure to do so was, we think, calculated to, and probably did, injuriously affect the defendant's rights. Defendant's guilt or innocence hinged solely upon self-defense, and it was all-important to him and to justice that the law in relation to that issue should be fully and clearly explained to the jury. The learned trial judge evidently desired and intended to perform this duty, but, as we have attempted to show, in material particulars failed to give the defendant the full benefit of self-defense, and such failure, in view of the evidence in this case, constitutes error for which the judgment must be reversed.

2. Whilst, in our opinion, it was competent for the defendant to prove, if he could, that the deceased had no probable cause for charging him with the crime of arson, and that de-

ceased did not in fact believe said charge to be true, but that the cause of deceased's enmity towards him was an entirely different matter than the arson, still we do not think the court erred in refusing to permit the witness Campbell to answer the question propounded to him, as to whether, in an investigation he had made about the arson, he had found any evidence tending to connect the defendant with it. The objection made to the question was, that the answer thereto would be but the conclusion of the witness. This objection, we think, was properly sustained. If the witness had been called upon to state facts within his knowledge concerning the arson, and the defendant's relation to those facts, such testimony would have been relevant and admissible in view of the other evidence in the case.

3. It was not error to reject the proposed testimony of the declarations of Tabler. Said declarations were made some time after the homicide, and were not a part of the *res gestæ* of the homicide. They were hearsay. The fact that Tabler was a co-conspirator with the deceased in seeking to take the life of the defendant would not render such declarations admissible in behalf of the defendant. If the deceased or Tabler had been on trial for a crime committed in furtherance of such conspiracy, then the declarations of one, made pending such conspiracy and in furtherance thereof, would be admissible against the other: Willson's Texas Criminal Laws, sec. 1048. But we know of no rule of law which would render admissible in behalf of the defendant the declarations of Tabler, made after the commission of the homicide.

4. In his closing argument to the jury, counsel for the state went out of the record, in speaking of Tabler, to tell the jury about the circumstances of Tabler's death,—the manner in which, by whom, and for what cause said Tabler had been killed, and why it was, and how it was that Tabler had killed one Teague, and several other matters in relation to said Tabler, about which there was no evidence. Counsel for defendant promptly objected to these remarks, and the court overruled the objection, appending to the bill of exceptions his reasons for so doing, which are, that defendant's counsel had, in their address to the jury, severely denounced, as a co-conspirator with the deceased, the said Tabler, etc. As shown by the evidence in the case, counsel for the defendant were justified in so denouncing said Tabler, and in so doing were but reproducing the evidence adduced on the trial. Counsel

for the state was not therefore warranted, in reply to this legitimate denunciation, in stating to the jury his individual knowledge of Tabler, and recounting to them the circumstances of the killing of Teague by Tabler, and the subsequent killing of Tabler by the father and brother of the deceased Teague. These matters were wholly foreign to the case on trial, without any support whatever in the evidence, and were calculated to operate upon the minds of the jury prejudicially to the defendant. These improper remarks, if there was no other error apparent in this record, would justify, if not demand, a reversal of the judgment.

5. A number of other errors are assigned, which we shall not discuss or determine, as they are of that character which are not likely to occur on another trial. Because of the errors in the charge, and the improper remarks to the jury made by counsel for the state, above mentioned, the judgment is reversed, and the case is remanded.

SELF-DEFENSE, RIGHT OF, where one's life has been threatened: *Bohannon v. Commonwealth*, 8 Am. Rep. 474; *Dupree v. State*, 73 Am. Dec. 422, and note. Where one has reasonable and well-grounded belief that he is actually in danger of losing his life or of suffering great bodily harm, he is justified in defending himself, whether the danger was real or only apparent: *State v. Benham*, 92 Id. 417, and note; *Logue v. Commonwealth*, 80 Id. 481, and note; *Dupree v. State*, 73 Id. 422; *Campbell v. People*, 61 Id. 49; *Noles v. State*, 62 Id. 711, and note 714; *State v. Hickam*, 95 Mo. 322; 6 Am. St. Rep.

DECLARATION OF CO-CONSPIRATOR after the commission of the act is inadmissible: *Martin v. State*, 25 Tex. App. 557; *Benford v. Sanner*, 80 Am. Dec. 545, note 550; *Spies v. People*, 3 Am. St. Rep. 320, and note, on the admissibility of declarations of co-conspirators, 487; and *State v. Glidden*, 3 Id. 23.

OPINIONS OF WITNESSES ARE GENERALLY INADMISSIBLE: See *Hurt v. St. Louis R'y Co.*, 4 Am. St. Rep. 374, and note; when admissible, generally, see note to *Commonwealth v. Sturtivant*, 19 Am. Rep. 410-412; *Baltimore & L. T. Co. v. Cassell*, 59 Id. 176-186.

DISCRETION OF COURT IN REGULATING CONDUCT OF COUNSEL IN ARGUMENT will not be interfered with, unless counsel is permitted, against objections, to make or persevere in improper remarks: *Sidekum v. Wabash etc. R'y Co.*, 3 Am. St. Rep. 549. Argument should be arrested by the court when not supported by any evidence: *Doster v. Brown*, 71 Am. Dec. 153.

LYNCH v. STATE.

[24 TEXAS APPEALS, 350.]

CRIMINAL LAW — MURDER — DECLARATIONS AS PART OF RES GESTÆ. — Declarations or acts of defendant in his own favor, unless part of the *res gestæ* or of a confession, are not admissible for the defense; hence defendant cannot prove his own statements or declarations with regard to the homicide, made within fifteen or twenty minutes after the killing, and after he had gone some twelve hundred yards from the place of the killing.

CHARGE IS RADICALLY AND FATALLY ERRONEOUS where there is a total want of evidence to support the phase of case to which the charge is applied, or where it assumes a theory not raised or indicated by the evidence.

CORRECT INSTRUCTION — CONSTRUCTION OF STATUTE. — It is not error to qualify the word "intention" by inserting before it the word "immediate" when charging the jury under section 608 of the Penal Code of Texas, which declares that threats afford no justification for homicide, "unless it be shown that, at the time of the homicide, the person killed, by some act then done, manifested an 'intention' to execute the threat so made," as a proper construction of the statute is, that the act done by deceased manifesting his intention to execute his threats must be such as shows an "immediate" intention.

Lusk and Thurmond, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. This appeal is from a judgment of conviction for murder of the second degree for the killing of one A. J. Guess, whose wife was a niece of this appellant. There are several bills of exceptions as well as assignments of error presented in the record, which attack certain rulings of the trial court upon questions of evidence and certain portions of the charge given the jury, as also the refusal to give certain requested instructions asked for defendant. We propose to notice only such matters complained of as are considered of moment on this appeal.

1. Defendant complains that the court erred in refusing to permit him to prove his own statements and declarations with regard to the homicide, made within fifteen or twenty minutes after the killing, and after he had gone in a wagon some twelve hundred yards from the place of the killing. This identical question occurred in *Stephens's Case*, 20 Tex. App. 255, and it was there held that "declarations of a defendant concerning the crime charged against him, made ten or fifteen minutes after the commission of the same, and after he had gone a distance of four or five hundred yards from the place

of the homicide, cannot be treated as *res gestæ*, and are, therefore, not admissible in his behalf." "Declarations or acts of a defendant in his own favor, unless part of the *res gestæ*, or of a confession offered by the prosecution, are not admissible for the defense": *Walker v. State*, 13 Tex. App. 619.

2. For the purpose of showing that the meeting with deceased was unpremeditated and accidental, defendant proposed to prove that, on the Saturday before the Monday when the killing occurred, he had told the proposed witness, Rogers, that he would be at the post-office at Elwood on Monday evening to get his mail. This evidence was claimed to be admissible in connection with other evidence which he had introduced, showing that he was on his way to Elwood at the time the difficulty occurred, and tended also to establish that fact. Whatever may have been the theory of the state at the beginning of the trial with regard to this matter, we are of opinion that the evidence upon that point is positive and uncontradicted, to the effect that defendant had started to and was on his way to the Elwood post-office, that he was going for his mail, that he was traveling the accustomed and most direct route; and there is no testimony that he had any purpose to seek and bring on a difficulty with deceased. True, he had a double-barreled gun with him. But this he had a right to carry, and if he was carrying it on account of the threats deceased had made against his life, this did not lessen, but only emphasized, the right. He did not go out of his road or way to meet deceased. On the contrary, when he found that deceased had unhitched his horse from the plow, and was rapidly following the wagon in which he was riding, he urges the driver to go faster, "to get out of his way," and they do get to the gate, close it, and are outside the field when the deceased overtakes them.

Now, if under these circumstances it was still an open question as to whether he was going to the post-office or not, then the excluded evidence was perhaps material and admissible as an additional fact going to prove it. If it was not an open or disputed question, the evidence was immaterial. In our opinion, enough has been shown to establish its immateriality, and if this had been the view of the learned trial judge, his ruling would have been correct. Such, however, does not appear to have been the case, because we find in the fifteenth paragraph of his charge, which is made a special ground for exception by the defendant, that the jury are instructed that "the de-

fendant had the right to go to the post-office, or any other place he desired to go for a lawful purpose, but if he started to or by the house of the deceased merely to get an excuse to kill him, or with the intention of seeking or getting into a fatal rencontre with the deceased, and thus got into the difficulty, then the defendant cannot justify the homicide, even though his life was put in peril."

With the testimony as disclosed in the record before us, there was no doubt as to his purpose and intention, or that it was a lawful one; he was, as all the witnesses who testify on that point say, going to the post-office. If this be so, then this instruction, in so far as it questioned his intention and purpose, was not warranted by evidence, and was calculated to prejudice him with the jury by impressing them with the idea that, in the opinion of the court, there was serious doubt upon the subject. To our minds, one of two things must be apparent,—either that the evidence excluded was material, and should have been admitted if this instruction was warranted, or the instruction was itself unwarranted, because there was no disputable matter upon which to predicate it. In either aspect of the case, the error is both important and serious. With the lights before us, we would say the ruling upon the evidence was correct, and the instruction erroneous. "However correct a principle of law may be in the abstract, it is error to give it in charge where there is a total want of evidence to support the phase of case to which it is applied": *Conn v. State*, 11 Tex. App. 390. "If the court assumes and charges on a theory not raised or indicated by the evidence, it is radical error, and fatal to a conviction": *Ross v. State*, 10 Id. 455; *Taylor v. State*, 13 Id. 184; *Hardin v. State*, 13 Id. 192; *Stewart v. State*, 15 Id. 598. A charge should be confined to the facts in evidence: *Boddy v. State*, 14 Id. 528; *Mayfield v. State*, 23 Id. 645.

3. A most vigorous attack is made, in the able brief of counsel for defendant, upon that portion of the charge of the court relative to threats made by deceased against defendant. It is insisted that whilst, in the twelfth paragraph, the court correctly announced the law as declared in article 608 of our Penal Code, that it was error in paragraphs 13 and 14 to interpolate the word "immediate," and thereby qualify the word "intention," as used in the statute. It is declared by the statute that threats afford no justification for homicide, "unless it be shown that, at the time of the homicide, the per-

son killed, by some act then done, manifested an intention to execute the threat so made." The jury were charged by the court that threats would afford no justification, unless the deceased "manifested an intention, by some act done at the time, showing an immediate intention to execute the threats."

Applied to the facts directly attendant upon the killing, it is contended that the use of the word "immediate" was not only unauthorized, but deleterious in the extreme. Deceased was unarmed. He had dismounted to open the gate, had come through, and was leading his horse, and defendant, who was still upon the ground, accosted him: "Hello, Jack; what are you in such a hurry for?" The reply was: "If I get my gun I will show you what I am in a hurry for." His gun was at his house, some forty or fifty yards distant. Defendant went to the west side of the wagon and took out his gun, and as deceased started round the left side of the wagon, defendant presented his gun at him and said: "Sir, wilt! You have been following me, and threatened and tried to kill me as often as I will allow you to." Deceased turned, and went round the east side of the wagon, still leading the horse, and said again: "If I get my gun I will kill you." Defendant walked to the head of the mules to the wagon, on the left side, and stopped, and when the deceased came opposite from the east side, defendant said: "Hold up," raised and presented his gun, and as deceased said, "Shoot, dog on you," he fired both barrels in quick succession, killing deceased instantly. Previous and deadly threats on the part of deceased were proven, and also the fact that he was a violent man, and one likely to execute his threats.

It was the theory of the defense that deceased had seen defendant passing in the wagon, had followed him rapidly, and, when shot, was going to his house, some forty or fifty yards distant, to get his gun, and with it execute his threats; and that defendant, in his legitimate right of self-defense, had the right, then and there, to anticipate and shoot him. A special instruction requested for defendant, and which was refused by the court, embraced this theory, as follows:—

"If you believe from the evidence that, at the time of the killing, Guess was advancing towards defendant and towards his (Guess's) house, with the avowed intention to get his gun and attack defendant, and take his life or do him some serious bodily injury; and if you further believe that the facts and circumstances in evidence were such as to create in the mind

of defendant a reasonable belief and apprehension that such was the intention of Guess, . . . then defendant might act in advance, and make the attack upon Guess. Nor was it necessary that there should in fact be real danger to defendant at the time of the killing, provided the facts and circumstances in evidence were such as to produce in the mind of defendant a reasonable fear or expectation of death, or serious bodily injury."

As before stated, the language of our statute (Pen. Code, art. 603) is, that threats afford no justification, "unless it be shown that at the time of the homicide the person killed, by some act then done, manifested an intention to execute the threat so made." In *Penland's Case*, 19 Tex. App. 365, the doctrine of self-defense enunciated by our supreme court in *Lander v. State*, 12 Tex. 462, is quoted approvingly, as follows: "The belief that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or at least is in apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately; citing 4 Ired. 409. No contingent necessity will avail." In *Weaver's Case*, 19 Tex. App. 547, speaking of the doctrine of self-defense, it is said that self-defense "is a defensive, not an offensive, act," and that "to justify the destruction of human life, the danger must not be problematical and remote, but (apparently) evident and immediate." And again: "The necessities of self-defense are limited to the immediate resistance of (apparent) aggression, and the apprehension must have been excited by (acts evincing) an actual assault. . . . The danger to be averted must be apparently immediate, pressing, imminent, and unavoidable": See *Hinton v. State*, 24 Tex. 454; *Holt v. State*, 9 Tex. App. 571.

In *Jones v. State*, 76 Ala. 8, it is held that, to "establish the plea of self-defense in a case of homicide, the defendant must have entertained at the time an honest belief in the existence of a present necessity on his part to kill in order to save his own life, or to prevent the infliction of grievous bodily harm, and the circumstances must have been such as to impress the mind of a reasonable man, under the same state of facts, with a belief of such imminent peril and urgent necessity."

In *People v. Westlake*, 62 Cal. 303, the rule announced is, that "past threats or conduct of the deceased, how violent soever, will not excuse a homicide without sufficient present

demonstration to authorize the belief that the deadly purpose then exists, and the fear that it will then be executed." See also *Id.* 204. And in *People v. Tamkin*, 62 Cal. 468, it is held that there must be such a demonstration of an immediate intention to execute the threat as to induce a reasonable belief that the party threatened will lose his life, or suffer serious bodily injury, unless he immediately defends himself against the attack of his adversary. In *State v. Horne*, 9 Kan. 119, it is said: "There must not only be reasonable ground to believe, but the purpose to execute the design must be accompanied by some attempt to execute it, or the person must at least be in an apparent situation to do so, and so induce a reasonable belief that he intends to do it immediately." See also *State v. Clifford*, 58 Wis. 113.

We are of opinion that a proper construction of the language of our statute (Pen. Code, art. 608) is, that the act done by deceased manifesting his intention to execute his threats must be such a one as shows an immediate intention,—“at the time,”—“then done,”—and not an intention dependent upon some other contingency. Deceased's language showed that he had no such immediate intention, but he told defendant to wait until he got his gun, which was in his house, forty or fifty yards away. In the light of the authorities cited, and our view of the proper construction of the statute, we do not think the charge of the court defective in the particular complained of; and, judged by the same rules of law, we think it must be apparent that the special requested instruction was not the law, and that consequently there was no error in refusing it.

Other questions presented on this appeal are of comparatively but little moment, and will not be discussed. Because the charge of the court in the fifteenth paragraph, as is previously shown, prejudicially instructed the jury as to a phase of the case unwarranted by the evidence, the judgment is reversed and the cause remanded.

DEFENDANT CANNOT PROVE HIS OWN ACCOUNT OF HOMICIDE given even a short time after its occurrence: *Dukes v. State*, 71 Am. Dec. 370, and note 381.

INSTRUCTION GIVEN WITHOUT EVIDENCE to support the theory advanced is error: *Andre v. Bodman*, 71 Am. Dec. 628, and note; *Chicago etc. R. R. Co. v. George*, 71 Id. 239; *Heirn v. McCaughan*, 66 Id. 588, note 603.

SELF-DEFENSE IN CASE OF HOMICIDE, GENERALLY: See *State v. Hickam*, 95 Mo. 322; 6 Am. St. Rep., and note; *Tillery v. State*, ante, p. 882. Threats do

not of themselves justify homicide, but are admissible, with other evidence, to show that defendant acted in self-defense: Note to *Campbell v. People*, 61 Am. Dec. 53-58; *Hopkins v. Commonwealth*, 88 Id. 518; *Ex parte Mosby*, 98 Id. 547.

DECLARATIONS AS PART OF RES GESTÆ IN CRIMINAL CASES, GENERALLY: See note to *People v. Vernon*, 95 Am. Dec. 62, 63. Declarations of accused are not generally admissible in his own favor: *Jones v. State*, 62 Id. 550, and note.

STOCKMAN v. STATE.

[24 TEXAS APPEALS, 387.]

EVIDENCE — WHOLE CONVERSATION ADMISSIBLE WHERE PART IS GIVEN IN EVIDENCE. — Where part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other party. Hence, where the prosecuting witness testifies that he found his stolen property in the possession of a third party, and that, in conversation with such party, the latter consented for witness to take his property, but afterwards refused to let him do so, the witness may be asked, on cross-examination, if, in the same conversation when declining to give up the stolen property, the third party did not claim, as a reason for his action, that he had purchased it.

ID. — DECLARATIONS AS RES GESTÆ. — When an act is done to which it is necessary or important to ascribe a character, motive, or object, anything said by the actor at the time from which the character, motive, or cause may be collected is part of the *res gestæ*, and may be given in evidence, whether the actor is or is not a party to the suit.

ERRONEOUS CHARGE — WEIGHT OF EVIDENCE. — Court cannot instruct as to amount or degree of evidence sufficient to warrant conviction. To do so is to charge upon the weight of evidence, and erroneous. Therefore, to charge that if a person is found in possession of property recently stolen, and if the circumstances are such as call upon him for an explanation, and he fails to explain the possession, then these facts would authorize his conviction, if a presumption of guilt has arisen in the minds of the jury from such facts, is error.

POSSESSION OF RECENTLY STOLEN PROPERTY UNEXPLAINED is *prima facie* evidence of theft, authorizing a presumption of guilt; but such presumption is not a legal one, but is one of fact, to be found by the jury. The court should not charge the conclusiveness of such presumption, but should submit the facts to be found by the jury.

CONVICTION for stealing sheep.

Austin Pollard, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. On his direct examinaion, the state had proved by the prosecuting witness Chilton that, in looking for his lost shep, he went to the shearing-camp of one Dean, and there saw Dean, and had a conversation with him about the

sheep, in which Dean stated that he had the sheep; also that Dean, at one of the conversations had with him, gave his consent for witness to take the sheep, and that subsequently he refused to let him do so. On cross-examination by defendant, the witness was asked if, in the conversation in which Dean declined to give up the sheep, he, Dean, did not claim as a reason for his action that he had purchased them. This question and the answer thereto were objected to, and the objection was sustained upon the ground that the evidence sought to be elicited was hearsay.

The evidence was admissible upon the principle that "when part of a conversation is given in evidence by one party, the whole, on the same subject, may be inquired into by the other": Code Crim. Proc., art. 571. Another well-settled rule under which the evidence was also legitimate and admissible is, that "when an act is done to which it is necessary or important to ascribe a character, motive, or object, what was said by the actor at the time from which the character, motive, or cause may be collected, is part of the *res gestæ*,—verbal acts,—and may be given in evidence, whether the actor be or be not a party to the suit": 1 Greenl. Ev., sec. 108, and note, and note on page 130; *Williams v. State*, 4 Tex. App. 5; *Sager v. State*, 11 Id. 110; *Pharr v. State*, 9 Id. 129.

In the sixth paragraph of the charge of the court, which is specially complained of, the jury were instructed: "If a person is found in possession of property recently stolen, and if the circumstances are such as call upon him for an explanation, and he fails to give any explanation of such possession, then these facts would authorize his conviction if a presumption of guilt has arisen in the minds of the jury from such facts." It is not for the judge to say what amount or degree of evidence is sufficient to warrant a jury in convicting. To do so is to charge upon the weight of evidence, and is reversible error: *Rice v. State*, 3 Tex. App. 451; *Lunsford v. State*, 9 Id. 217; *Stephens v. State*, 10 Id. 120; *Stone v. State*, 22 Id. 186.

In *Ayres v. State*, 21 Tex. App. 399, it was held that "possession of recently stolen property, if such possession be unexplained, is *prima facie* evidence of theft, such as will authorize the inference or presumption of guilt, but such inference or presumption is not a mere legal one, but is one of fact to be found by the jury. The trial court should in no instance charge the conclusiveness of such inference and presumption, but should submit them as facts to be found by the jury; for at most

they are but circumstances from which guilt is inferred, and not positive proof establishing it."

For the errors discussed, the judgment is reversed and the cause remanded.

WHOLE CONVERSATION IS ADMISSIBLE WHERE PART HAS BEEN GIVEN IN EVIDENCE: See note to *Rouse v. Whited*, 82 Am. Dec. 342-345; *Morehouse v. Northrop*, 89 Id. 211.

ADMISSIBILITY OF DECLARATIONS AS PART OF RES GESTÆ: See extended note to *People v. Vernon*, 95 Am. Dec. 51-76; *Hamilton v. State*, 10 Am. Rep. 22, note 28.

INSTRUCTIONS UPON WEIGHT OF EVIDENCE, or assuming facts to be proved, are erroneous: *People v. Levison*, 76 Am. Dec. 505; *State v. Dick*, 86 Id. 439, and note; *State v. Daniel*, 97 N. C. 393.

POSSESSION OF STOLEN PROPERTY AS EVIDENCE OF LARCENY: See note to *Hunt v. Commonwealth*, 70 Am. Dec. 447-452; *State v. Johnson*, 86 Id. 434; *People v. Hurley*, 44 Am. Rep. 55; *Lehman v. State*, 51 Id. 298. In *Wright v. Commonwealth*, 82 Va. 183, it is said that though such possession unexplained may not be conclusive evidence, it is admissible to prove the crime.

WHITFORD v. STATE.

[24 TEXAS APPEALS, 489.]

CRIMINAL LAW—BURGLARY—FORMER CONVICTION NOT A BAR.—Where a party is convicted of burglary as a principal, he is still liable to a prosecution for conspiracy to commit the same burglary, and the conviction for the burglary will not bar the prosecution for the conspiracy under the Texas statute declaring that conspiracy is complete if two or more persons positively agree between themselves to commit burglary, though the burglary is not committed.

Gerald Griffin, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

HURT, J. Whitford, Neiderluck, alias Miller, Edward Levi, and Frank Hawkins were jointly indicted for conspiracy to commit burglary. Appellant Whitford was tried alone, a severance being had, was convicted, and appeals to this court. In bar to this prosecution, appellant interposed a plea of conviction for the burglary. Upon motion of the district attorney, this plea was stricken out, and appellant excepted.

Was the plea a bar, conceding it to be true, to the prosecution for conspiracy? Appellant was convicted of the substantive offense, to wit, burglary as a principal, not as an accomplice. Being placed on trial for conspiracy to commit the same burglary, will the conviction of the burglary as a

principal bar the prosecution for the conspiracy? We have examined all the authorities accessible to us at this place, but have failed to find in any work the precise question presented or discussed.

The doctrine of merger does not solve the question, but the doctrine of "carving" does to some extent aid in its solution. Says Mr. Bishop: "There is a difference between a crime and a criminal transaction. A criminal transaction may be defined to be an act or series of acts proceeding from one wrongful impulse of the will of such a nature that one or more of them will be indictable. . . . In reason there may be any number of distinct crimes in a single criminal transaction. This comes from the fact that the words of our language being limited, while the transactions of life may almost be termed infinite in variety, and the lines to be drawn around specific offenses being necessarily incomparably more limited than the words, it is impossible there should be an exact outline of crime whose circumference shall exactly coincide with every criminal transaction. The consequence is, that the law does, what it must, declare this combination a fact and intent to be indictable, then another combination, and another, and so on, until it is supposed to have proceeded far enough, when it stops. And when this is done, it is impossible the inhibitions should be so distinct that no one shall embrace anything forbidden by another. Therefore it is established doctrine that more than one offense may be committed by a man in one transaction. Whether a prosecution for one crime carved out of the one transaction should be held to bar an indictment for another crime carved out of the same transaction, is a different question; but the authorities appear to be, that in some circumstances it will be, and in others it will not."

Now, in harmony with these principles, our code has carved two offenses from this one criminal transaction. It has declared that the offense of conspiracy is complete if two or more persons positively agree between themselves to commit burglary, though the burglary is not committed: Pen. Code, arts. 800, 801, 802, 804.

Under what circumstances will a conviction for one cause carved out of one transaction bar an indictment for another, when carved out of the same criminal transaction? Now, if A steals a horse and saddle at the same time, a conviction for the one bars a prosecution for the other. This is well settled, and plain sailing. Let us suppose A, B, and C conspire to steal

three horses from the same stable and ride them out of the city, and with a view of carrying out this criminal transaction they steal three saddles the night before the theft of the horses, certainly a conviction for the theft of the horses would not bar an indictment for the theft of the saddles; and this would be so, though the theft of the saddles was a part of the same criminal transaction.

On the other hand, let us submit an illustration. Suppose appellant had been convicted of the burglary as an accomplice by proof of the very facts which make up the conspiracy, would such a conviction bar an indictment for the burglary? An accomplice is one who agrees with the principal offender to aid him in committing the offense, though he may not have given him such aid.

A, B, and C enter into a positive agreement to aid one another in murdering E; A commits the murder; B and C are accomplices,—the fact that the agreement was positive, and that each would aid in the commission of the offense would not alter the case; all not present would be accomplices. But to convict B and C as accomplices, the state would have to rely upon the facts constituting the conspiracy. This would be so in the supposed case, but not in all cases, by any means; for quite a number of acts may constitute the actor an accomplice which would not technically constitute “a conspiracy.” We would hold that, in the supposed case, a conviction for the substantive offense as an accomplice would bar an indictment for the conspiracy. Upon what principle? Obviously, upon the principle that a party cannot be constitutionally convicted twice for the same acts and intent.

The case in hand does not occupy this attitude. Appellant was convicted of the burglary as a principal offender, and while the conspiracy may have been adduced in evidence in order to establish the burglary, and, in connection with other facts, to prove the guilt of appellant as a principal, yet this would not be a conviction upon the acts constituting the conspiracy. For, upon trial for an offense, evidences of other offenses is very frequently and justly received; and because proof of other offenses has been drawn upon to aid in convicting of a certain crime, this fact does not bar a prosecution for the other offenses.

We are of opinion that, under the facts of this case, to wit, that appellant was convicted as principal for the burglary, that there was no error in sustaining the district attorney's

motion to strike out the plea. The indictment is good, and not subject to the objection that it is duplicitous.

We find no error in the judgment, and it is affirmed.

CRIMINAL CONSPIRACY GENERALLY: See note to *Spies v. People*, 3 Am. St. Rep. 473 et seq.

PLEA OF FORMER ACQUITTAL OR CONVICTION: See extended note to *Roberts v. State*, 58 Am. Dec. 536-549.

MERGER OF CRIMES. — The law of merger as applied in criminal law is well stated by Mr. Wharton in his work on criminal law, volume 1, ninth edition, section 27 a, as follows: "Merger is said to exist when the lesser offense is absorbed in the greater; but in criminal practice the only cases in which such absorption is claimed to be operative is when a misdemeanor is an ingredient of a felony, in which case the older authorities maintain that the trial must be exclusively for the felony, and that the defendant cannot, under an indictment for felony, be convicted of misdemeanor. The reason alleged for this is, that in those days the incidents of a trial for felony were so different from those of a trial for misdemeanor that it was not right to invest the prosecution with the power of interchanging them at its caprice. A party charged with felony, for instance, was not entitled to counsel, and his right of challenge and his right to a copy of the indictment were restricted. If there were no merger, — if, on the one side, the defendant, on proof of the felony on an indictment for misdemeanor, could be convicted of the misdemeanor charged; or if, on the other side, on disproof of the felony on an indictment for the felony he could be convicted of the constituent misdemeanor, — this would do away with the distinction between felonies and misdemeanors, as above stated. This distinction, however, the courts could not do away with, and the only way to avoid this was to preserve the line of demarkation between felonies and misdemeanors intact. This they did by determining that there could be no conviction of a misdemeanor on an indictment for a felony, for this would deprive the defendant of privileges to which he would be entitled if the indictment was for a misdemeanor, and that if the offense charged was a misdemeanor and the offense proved turned out to be a felony, then there must be an acquittal, which would not bar an indictment for felony on the trial of which defendant would be put, under due restrictions as to counsel and other privileges. As will be hereafter seen, since the abolition of these distinctions between felony and misdemeanor the doctrine of merger, as above stated, has no reasonable ground to stand upon, or basis upon which to rest. The consequence is, that a defendant charged with an assault is no longer, as a rule, held to be entitled to an acquittal because the assault is part of a felony; while by statute, if not by judicial construction, there are no jurisdictions in which a defendant, on an indictment for felony, cannot be acquitted of the felony and convicted of the constituent misdemeanor, if duly pleaded. If, however, there is no constituent misdemeanor duly pleaded, then the defendant, if acquitted of the felony, cannot be convicted of a misdemeanor proved on the trial but not averred in the indictment." And again, the author says, at section 395: "Even supposing treason exists, the felony of murder or manslaughter does not merge in it. Merger only exists where a misdemeanor and a felony form a constituent part of the same act; as where an attempt to commit a larceny and the larceny itself unite. In such cases it is the felony alone that can be prosecuted. But two felonies cannot thus coalesce, for, being each of equal grade, neither sinks into the

other." The same conclusions are reached by Mr. Bishop in his work on criminal law, 7th ed., chapter 53, and sections 804-814, of volume 1. In the discussion which follows, no attempt will be made to treat the subject as to when a party indicted for the higher crime, with sufficient allegations, may be convicted of the lesser offense, shown by the proof to be a part of the greater criminal transaction, but merely when the lesser crime is merged or obliterated by the greater, growing out of the same act or series of acts.

MERGER OF CONSPIRACY IN FELONY. — As a conspiracy to commit a felony is only one step toward the completion of the act, and is only a misdemeanor, the body of the American cases have followed the old common-law rule, that where a party is being tried for a conspiracy, and it is shown that he has proceeded to the actual commission of a felony by a succession of acts, the misdemeanor or conspiracy is merged, and he cannot be convicted. In other words, a conspiracy to commit a higher crime merges in that crime, if committed, and the conspirator cannot be indicted and punished for the conspiracy as a distinct offense: *Commonwealth v. Kingsbury*, 5 Mass. 105; *State v. Mayberry*, 48 Me. 218; *Commonwealth v. Blackburn*, 1 Duvall, 4; *State v. Noyes*, 25 Vt. 415; *People v. Mather*, 4 Wend. 229-265; 21 Am. Dec. 122; *People v. Richards*, 1 Mich. 216; *Commonwealth v. Parr*, 5 Watts & S. 345; *Commonwealth v. Delany*, 1 Grant Cas. 224; *Elkin v. People*, 28 N. Y. 177. Where the crime is a misdemeanor by the common law, but by statute is made a felony, the misdemeanor is merged: *People v. Fish*, 4 Park. Cr. 206-212. The rule as sustained by the above authorities is well stated, and the reasons therefor given, in *Johnson v. State*, 26 N. J. L. 312-324, where it is said: "If, therefore, on the trial for a misdemeanor, it appears that the same act involves a felony, the proceedings will be arrested; otherwise the conviction and judgment on the lesser offense may be pleaded in bar of a prosecution for the higher crime, and offenders escape without due punishment; but unless it appears that the same act involves both offenses, the lesser will not merge." And again, in *Johnson v. State*, 29 Id. 453-462, it is said: "It is also objected to this record, that while it contains an indictment and conviction for a conspiracy merely, it at the same time discloses and charges the commission of a crime of much greater magnitude, viz., perjury, and subornation of perjury, and that as a consequence the lesser offense is merged in the greater, and that an indictment for the lesser, which contains on its face an allegation and charge showing the commission of the greater, is bad, and will not be sustained. Such has doubtless long been the law, and it should be applied to this case if it comes within the principle. The law in this respect rests, I presume, on the very well-established principle, that a person cannot be twice tried for the same offense, and it would be unjust to the public, and contrary to its policy, to permit a person to be indicted and convicted of some small offense which might be carved out of some particular transaction involving crime of the very highest grade, and thus escape almost entirely the punishment to which by law he was amenable." The doctrine, however, has been expressly repudiated in England, where it is held that on an indictment for conspiracy, which is a misdemeanor, it is no ground for an acquittal that the evidence necessary to prove the lesser crime also shows that it is part of a felony, and that the felony has been committed. Thus upon an indictment for conspiracy to commit larceny, and charging that in pursuance of that conspiracy the larceny had been committed, the accused is not entitled to acquittal, though the evidence shows that he was guilty of felony, the conspiracy proved making him accessory before the fact to the felony, or crime of larceny: *Regina v. Button*, 11 Q. B. 929; 3 Cox C. C.

229; and to the same effect, *Regina v. Boulton*, 12 Cox C. C. 87-93. Some of the states have statutes which provide that a conspiracy to commit a felony does not merge in the felony when committed, but may be tried separately: *People v. Arnold*, 46 Mich. 268-274; *Laura v. State*, 26 Miss. 174; and the tendency of many other cases is toward the doctrine that the conviction of a lesser offense will not bar a prosecution for a greater crime which grows out of the same act or series of acts: *State v. Littlefield*, 35 Am. Rep. 335, and note 339-345; *Kelsey v. State*, 62 Ga. 558; *People v. Saunders*, 4 Park. Cr. 196.

CRIMES OF EQUAL DEGREE DO NOT MERGE. Where the object of a conspiracy is to commit a misdemeanor, the conspiracy is not merged in the misdemeanor when the crime is committed. The rule is correctly stated in *People v. Mather*, 4 Wend. 229-265, 21 Am. Dec. 122, where it is said: "It is supposed that a conspiracy to commit a crime is merged in the crime when the conspiracy is executed. This may be so where the crime is of a higher grade than the conspiracy, and the object of the conspiracy is fully accomplished; but a conspiracy is only a misdemeanor, and when its object is only to commit a misdemeanor, it cannot be merged. Where two crimes are of equal grade, there can be no legal technical merger": *Commonwealth v. Kingsbury*, 5 Mass. 108; *Commonwealth v. Blackburn*, 1 Duvall, 4; *People v. Richards*, 1 Mich. 216; *Commonwealth v. Parr*, 5 Watts & S. 345; *Commonwealth v. Delany*, 1 Grant Cas. 224; *Commonwealth v. Bakeman*, 105 Mass. 53; *Commonwealth v. Walker*, 108 Id. 309; *Commonwealth v. Dean*, 109 Id. 349; *Hartman v. Commonwealth*, 5 Pa. St. 60; *State v. Murray*, 15 Me. 100; *State v. Murphy*, 6 Ala. 765; 41 Am. Dec. 79. Thus a conspiracy to impede an officer in the discharge of his official duties will not merge in the crime of actually impeding the officer: *State v. Noyes*, 25 Vt. 415. A conspiracy to cheat by false pretenses, and an actual cheating by such pretenses, will not merge: *State v. Mayberry*, 48 Me. 218. And under this head, that crimes of equal magnitude do not merge in each other, may be cited as an example the fact that burglary and grand larceny are distinct felonies of the same grade, and subject to the same nature of punishment, and are therefore not subject to the doctrine of merger: *Bell v. State*, 48 Ala. 684; 17 Am. Rep. 40; 2 Am. Crim. Rep. 627; *Howard v. State*, 8 Tex. App. 447; *Smith v. State*, 22 Id. 350. So an assault and battery with intent to rob is not merged in the robbery when committed, as both are of the same grade of crime, viz., felonies: *Hamilton v. State*, 36 Ind. 280; 10 Am. Rep. 22. And where trespass is made a felony by statute, it does not merge in a felony committed in connection with the trespass: *White v. Fort*, 3 Hawks, 251.

BOWERS v. STATE.

[24 TEXAS APPEALS, 542.]

TO CONSTITUTE THE CRIME OF MAIMING, the act must be done both willfully and maliciously.

CRIMINAL LAW. — WILLFUL ACT IS ONE COMMITTED with an evil intent, with legal malice, without reasonable ground for believing the act to be lawful, and without legal justification.

CRIMINAL LAW. — MALICIOUS ACT IS ONE committed in a state of mind which shows a heart regardless of social duty, and fatally bent on mischief; a wrongful act intentionally done, without legal justification or excuse.

CRIMINAL LAW. — IN TRIALS FOR MAIMING, the court, in instructing the jury, must explain the legal meaning of the words "willfully" and "maliciously."

CRIMINAL LAW. — IN TRIAL FOR MAIMING, evidence which tends to show that the violent injury inflicted was not committed with a "willful and malicious" intent, within the legal meaning of such words, is admissible, and to reject it is material error.

CRIMINAL LAW. — EACH CONSPIRATOR IS RESPONSIBLE FOR EVERYTHING DONE by his confederates which follows incidentally in the execution of the common design, as one of its natural and probable consequences, even though it was not intended as a part of the original design or common plan. If the act is the ordinary and probable effect of the wrongful act specifically agreed upon, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of and foreign to the common design, all are conspirators.

CRIMINAL LAW — CONSPIRACY. — JURY MUST DETERMINE whether the act done by a member of a conspiracy naturally flowed from and was done in furtherance of the common design, so as to make him guilty as a participant in the conspiracy.

CRIMINAL LAW — MAIMING A QUESTION FOR JURY. — Biting off a portion of the member of a man's body is not necessarily maiming; and the jury must determine whether the member was so injured as to substantially deprive the injured party of it, and constitute the crime.

P. P. Norwood, for the appellant.

W. L. Davidson, assistant attorney-general, for the respondent.

WILLSON, J. To constitute the offense of maiming, the act must be done both willfully and maliciously. A willful act is one committed with an evil intent, with legal malice, without reasonable ground for believing the act to be lawful, and without legal justification. A malicious act is one committed in a state of mind which shows a heart regardless of social duty and fatally bent on mischief; a wrongful act intentionally done, without legal justification or excuse.

In trials for this offense, the legal signification of the words "willfully" and "maliciously," must be explained to the jury: Willson's Texas Criminal Laws, secs. 876, 877. This, we think, was substantially and sufficiently done in this case. But we are of the opinion that the court committed a material error in rejecting the testimony of the witnesses Ledbetter and Foster, offered by the defendant for the purpose of showing, or as tending to show, that the violence inflicted upon the injured party was not inflicted willfully and maliciously, within the legal signification of those terms. We think the rejected testimony was pertinent to the issue of intent, and that the defendant was entitled to have it placed before the jury for

their consideration, in connection with the other evidence adduced.

It is insisted by counsel for the defendant that the law applicable to the facts of this case was not given in charge to the jury. It appears from the evidence that the defendant, one Estes, Dansby, the injured party, and others were confined as priseners in the county jail. Dansby had testified as a witness at an inquest held over the dead body of a negro prisoner who had been killed in said jail a short time before the difficulty occurred which is the foundation of this prosecution. Defendant and Estes charged that he had given false testimony before said inquest, and they and others of the prisoners agreed that for so falsely testifying they would whip Dansby with a leather strap, an instrument which they had in jail. In pursuance of this agreement, they assaulted Dansby, who resisted them. Estes, assisted by the defendant and others, threw Dansby upon the floor. Estes and Dansby were fighting each other, and during the fight, while the parties were down on the floor, Dansby was deprived of a portion of one of his thumbs.

It is clear, from the evidence, we think, that the injury to Dansby's thumb was caused by the teeth of Estes. Estes seized Dansby's thumb with his teeth, and the defendant kicked Dansby on the arm, thus extricating Dansby's thumb from Estes's teeth. It is not clear, from the evidence, what motive actuated the defendant in kicking Dansby on the arm; whether his purpose was to aid Estes in the struggle, or to release Dansby's thumb from Estes's teeth. But we will not pause to consider or discuss this feature of the case.

The important and controlling question presented by the facts is, whether or not the defendant is criminally responsible for the act of Estes in biting Dansby's thumb. It is made clear by the evidence that defendant, Estes, and others had entered into a conspiracy to whip Dansby with the leather strap. Does the fact that defendant had entered into and engaged in the execution of such a conspiracy render him liable with Estes for biting Dansby's thumb?

Upon the subject of the responsibility of a conspirator for the acts of his co-conspirators, the rule, as we deduct from the authorities, is, that each conspirator is responsible for everything done by his confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences, even though it was not

intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of or foreign to the common design: 1 Wharton's Crim. Law, 9th ed., secs. 214-220, 397; 1 Bishop's Crim. Law, 7th ed., secs. 640, 641; *Lamb v. People*, 96 Ill. 73; *Ruloff v. People*, 45 N. Y. 213; *Thompson v. State*, 25 Ala. 41; *Frank v. State*, 27 Id. 37; *Williams v. State*, 83 Id. 16; *Kirby v. State*, 23 Tex. App. 13. The last-cited case is not in conflict with the rule as above stated, but is in perfect harmony with it, when viewed with reference to the facts before the court.

Now, the rule being as we have stated it to be, the responsibility of the defendant for the said act of Estes depends upon the solution of another question; that is, was the act of Estes in biting Dansby's thumb the ordinary and probable effect of the wrongful act of attempting to whip Dansby with a leather strap? or was it a fresh and independent product of the mind of Estes, outside of or foreign to the common design? If the former, the defendant is responsible for the act; but if the latter, he is not responsible for it. How must this question be solved? By the jury alone. It is a question of fact, and within the exclusive province of the jury.

In the recent and celebrated case of *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, the court said: "Whether or not the act done by a member of a conspiracy naturally flowed from and was done in furtherance of the common design, are questions of fact for the jury." We are of the opinion that the court erred in not submitting the question above stated to the jury, accompanied by proper instructions explaining the rules of the law hereinbefore announced. This phase of the case as made by the evidence was not covered by the charge. Defendant's counsel requested a special charge relating to it, which, although not full and accurate, was sufficient to direct the attention of the court specially to the issue.

Another issue which should have been submitted to the jury is, whether the injury inflicted on Dansby's thumb constituted maiming. Biting off a portion of a member of the body is not necessarily maiming. It should be left to the jury to determine in all such cases whether the member was so injured as to substantially deprive the injured party of it: Willson's

Texas Criminal Laws, sec. 877. This issue the court failed to submit to the jury, and in so failing did not give the jury the whole law applicable to the evidence.

Because of the errors mentioned, the judgment is reversed, and the cause is remanded for a new trial.

MALICE, DEFINITION OF: *Commonwealth v. York*, 43 Am. Dec. 373; *McCoy v. State*, 78 Id. 520, note 529; note to *Terwilliger v. Wands*, 72 Id. 429.

CRIMINAL CONSPIRACY, LAW OF, GENERALLY, and what constitutes a conspirator: *Spies v. People*, 3 Am. St. Rep. 320, and note on the subject 474 et seq.; see also *State v. Glidden*, 3 Id. 23, note 39; *Spencer v. State*, 4 Id. 74, note 77.

BEATING A PERSON AND FRACTURING HIS SKULL was held not to constitute mayhem, in *Commonwealth v. Somerville*, 5 Am. Dec. 514.

CARR v. STATE.

[24 TEXAS APPEALS, 562.]

CRIMINAL LAW — NONAGE — BURDEN OF PROOF. — Where nonage of defendant is established at the time the crime was committed, the prosecution, in order to convict, must prove that at the time defendant committed the crime he understood the nature and illegality of the act. Proof that he knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age, does not fill the requirements of the law. It must be shown that he had sufficient discretion to understand the nature and illegality of the act constituting the crime.

Id. — PROOF OF AGE OF DISCRETION between good and evil need not be made by direct and positive evidence. Circumstances of education, habits of life, general character, moral and religious instructions, and often facts connected with the crime charged, will be sufficient to satisfy the jury that the defendant had the discretion required to render him responsible for the crime.

Id. — OPINION AS EVIDENCE of age of discretion between good and evil. Witnesses, after they have stated the facts upon which their opinions are based, may state their opinions as to whether the defendant, at the time he committed the crime, had sufficient discretion to understand the nature and illegality of the acts constituting it; but the weight to be given to the opinions is for the jury to consider and determine.

Id. — CONFESSION AS EVIDENCE. — Confession not made under the influence of fear, or of any positive promise of benefit to be gained, and under caution that it could be used against him, is admissible in evidence against defendant.

Id. — CONTRADICTION OF CONFESSION — CREDIBILITY OF EVIDENCE. — Where the confession states that in committing burglary defendant acted under the compulsion of another party, and is contradicted by the party himself, the jury must determine the credibility and weight of the evidence, and in doing so they may believe one portion of the confession, and reject as untrue another portion contradicted by evidence produced.

ID. — CONFESSION AS EVIDENCE — INSTRUCTIONS. — Where defendant has confessed that he entered a house with intent to steal therefrom, conviction is not sought, or wholly founded on circumstantial evidence, and it is not necessary to instruct as to circumstantial evidence.

JUDGMENT WILL NOT BE REVERSED where the evidence of guilt, though not entirely free from doubt, is still legally sufficient to support the judgment of conviction.

INDICTMENT and conviction for burglary.

Sims and Wright, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. At the time of the commission of the offense, the evidence shows that the defendant was over nine but under thirteen years of age. His nonage being established, the burden devolved upon the state, in order to subject him to punishment, to prove that at the time he committed the offense, if he did commit it, he understood the nature and illegality of the act. Proof that he knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age, does not fill the requirements of the law. It must be shown that he had sufficient discretion to understand the nature and illegality of the particular act constituting the crime.

It is not required that proof of discretion should be made by direct and positive testimony. In most instances, circumstances of education, habits of life, general character, moral and religious instructions, and oftentimes the circumstances connected with the offense charged, will be sufficient to satisfy the jury that the defendant had the discretion required to render him responsible for the crime: Willson's Texas Criminal Laws, secs. 71-74.

On the trial of this case the court, over the objections of the defendant, permitted several witnesses to state their opinions as to the discretion of the defendant, and these rulings of the court are presented for revision by proper bill of exception, and insisted upon as error. The precise question thus presented has never been directly adjudicated by the courts of last resort in this state. A familiar general rule of evidence is, that witnesses can only speak as to facts, and cannot be permitted to state their belief or opinions. But to this general rule there are well-settled exceptions, one of which is, that where the issue is as to the sanity of a person, even witnesses who are not experts are permitted to state their opinions and conclusions upon the facts to which they testify: Willson's

Texas Criminal Laws, sec. 87. See also, as to other exceptions, *Cooper v. State*, 23 Tex. 331; Wharton's *Crim. Ev.*, secs. 459, 460; Roscoe's *Crim. Ev.*, 7th ed., 143, 144.

Should the exception which applies where the issue is sanity apply in this case? We can see no good reason why it should not. In the two cases the inquiry is substantially the same,—that is, the mental *status* of the defendant at the time of the commission of the act. The two issues are analogous, if not precisely the same, and it seems to us that evidence which is competent upon the one should be held competent upon the other. We hold, therefore, that it was not error to permit the witnesses to state their opinions that the defendant, at the time of the commission of the burglary, had sufficient discretion to understand the nature and illegality of the acts constituting that crime, said witnesses having stated the facts upon which their opinions were based,—that is, their acquaintance with the defendant; that he was a bright boy, could read and write, etc. As to the weight to be given to these opinions, that was a matter for the jury to consider and determine, and does not relate to the admissibility of the opinions as evidence.

With respect to the charge of the court upon the issue of the defendant's discretion, it is in our opinion correct, and presents the defense of infancy affirmatively and clearly. It was not error, therefore, to refuse to give the special instructions requested by the defendant's counsel upon said issue.

As to the admissibility of the defendant's confession, we think there can be no doubt. He was properly cautioned before making the confession, that it could be used against him. It was not made under the influence of fear, or of any positive promise of a benefit to be gained by him by making it. Under the rules now governing the admissibility of confessions, we do not think the court erred in admitting the confession: *Rice v. State*, 22 Tex. App. 654; *Thompson v. State*, 19 Id. 595.

That portion of the defendant's confession which stated that in burglarizing the house he acted under compulsion of another party was contradicted by the testimony of the party named. It was for the jury to determine the credibility and weight of the evidence, and in doing so it was within their province to believe one portion of the confession to be true, and to reject as untrue another portion which had been contradicted by other testimony adduced.

Defendant having confessed that he entered the house with intent to commit theft therefrom, the case is not one in which

the conviction was sought or wholly founded upon circumstantial evidence, and it was not necessary, therefore, that the court should instruct the jury with regard to circumstantial evidence.

We have given this case a careful consideration, and we find no reversible error disclosed in the record. While the evidence of defendant's guilt cannot be said to be entirely free from suspicion and doubt, still it must be regarded as legally sufficient to support the conviction. The judgment is therefore affirmed.

CAPACITY OF INFANT TO COMMIT CRIME: See extended note to *Godfrey v. State*, 70 Am. Dec. 496-499; *Heilman v. State*, 4 Am. St. Rep. 207, and note.

OPINION AS EVIDENCE GENERALLY: See *Tillery v. State*, ante, p. 882, and cases cited in note.

CONFESSIONS, WHEN ADMISSIBLE AS VOLUNTARY: See *People v. Barker*, 1 Am. St. Rep. 501, and note; *Brown v. State*, 3 Id. 682, and note.

WHERE IT APPEARS FROM CONFESSION, or other evidence, that a part of the confession is untrue, such part may be disregarded: *Brown v. Commonwealth*, 33 Am. Dec. 263.

BOYD v. STATE.

[24 TEXAS APPEALS, 570.]

CRIMINAL LAW. — RECENT POSSESSION OF STOLEN PROPERTY is not positive evidence of theft; it is only a circumstance tending to establish it; and where the case depends upon recent possession, it is one of circumstantial evidence, and the law presenting that character of case must be submitted to the jury. To omit to do so is error; for whilst, under certain conditions, recent possession will support a conviction for theft, it is, in connection with the other conditions, only one of the circumstances from which guilt is inferred.

ID. — POSSESSION OF PROPERTY RECENTLY STOLEN — PRESUMPTION — QUESTION FOR JURY. — When party, in whose exclusive possession property recently stolen is found, fails reasonably to account for his possession when called upon, or when the facts are such as to require of him an explanation, the presumption of guilt arising from the recent loss and possession will warrant conviction without further proof. But in such case, the jury must be explicitly instructed that, unless they find that such possession was recent, they will indulge no presumption of guilt because of the fact that defendant was found with such property in his possession.

ID. — INSTRUCTIONS. — To CONVICT OF THEFT, it must be shown that defendant had some connection with or complicity in the original taking of the property. Proof that subsequently and without complicity, but with knowledge that the property was stolen, he aided the taker to dispose of it, will not warrant conviction; hence the jury should be instructed that, in order to convict, they must believe, beyond a reasonable

doubt, that defendant is guilty of the original fraudulent taking; and any subsequent connection, either in good or bad faith, with the property after the taking, would not constitute theft.

Id.—**TESTIMONY OF ACCOMPLICE**, to be sufficient to convict, must be corroborated, not merely so as to show that the crime charged was committed, but must also show defendant's complicity therein; and where the original taking is the material part of the case, the accomplice must be corroborated on that particular point.

Jones and Cunningham, F. G. Thurmond, and C. I. Evans, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. Appellant and one Willis were jointly indicted for the theft of one head of cattle, the property of one W. T. Wright. They severed on the trial, and each was separately convicted, and both cases are on appeal to this court.

By the testimony of W. G. Wright, the alleged owner, it appears that his home was in Taylor County, and that the range of the animal was on Elm Creek, one and a half miles west of Abilene, in Taylor County. He had not seen the cow for three months, and did not know she had been stolen until he was notified. He found her in and received her from the possession of the sheriff of Jones County, who had taken her from the possession of the appellant and others in the latter county. There is no testimony, either positive or circumstantial, going to show that the defendants, or any one with whom they might be supposed to have been acting in concert, were ever seen taking or in possession of the cow in Taylor County. On the contrary, the first time the defendants are shown in the possession of, or as having any connection with the animal, is at the appellant Boyd's pen, some twenty miles from Anson, in Jones County, where they are shown to have changed the marks and brands upon it. At most, this evidence makes the case one of recent possession.

Recent possession is not positive evidence of theft; it is but a circumstance tending to establish it. A case dependent alone upon recent possession is a case of circumstantial testimony, and the law presenting that character of case should be submitted to the jury; because, whilst under certain conditions recent possession will support a conviction for theft, it is, in connection with such other conditions, only one of the circumstances from which the guilt is inferred: *Perry v. State*, 41 Tex. 484; *Faulkner v. State*, 15 Tex. App. 115; *Lehman v. State*, 18 Id. 174; 51 Am. Rep. 298; *Sullivan v. State*, 18 Tex. App. 623; *Scott v. State*, 19 Id. 325; *Ayres v. State*, 21 Id. 400;

Willson's Texas Criminal Laws, sec. 1299; *Schultz v. State*, 20 Tex. App. 308.

Being a case of circumstantial evidence, it was error in the court to omit to charge, and was error to refuse the special requested instructions to the jury with regard to the law governing such character of cases. With regard to recent possession, in general terms the rule is, that if a party, in whose exclusive possession property recently stolen is found, fails reasonably to account for his possession when called upon to explain, or when the facts are such as to require of him an explanation, the presumption of guilt arising from recent loss and possession will warrant a conviction without the necessity of further proof: *Robinson v. State*, 22 Tex. App. 690; Willson's Texas Criminal Laws, secs. 1299, 1300.

In such a case, however, it should be left to the jury, under proper instructions, to determine the question of recent possession, and they should be explicitly instructed that, unless they found such possession was recent, they would indulge no presumption of defendant's guilt because of the fact of his being found in possession of the property: *Bragg v. State*, 17 Tex. App. 219; *Curlin v. State*, 23 Id. 681; *McCoy v. State*, 44 Tex. 616; Willson's Texas Criminal Laws, sec. 1306. The court omitted any charge upon this branch of the law of the case, and refused a special requested instruction calling attention to the matter.

As stated above, there was no direct evidence as to the original taking of the animal. It seems quite clear, however, that the defendants had every reason to know and believe that the cow was stolen when they changed her mark and brand, and when they received her into their possession; and it does appear to us that much trouble encountered by the prosecution might have been avoided by trying the defendants as receivers of stolen property, under article 743 of the Penal Code, or perhaps better still, for altering and defacing the mark and brand, as provided in article 760, Penal Code; both of which offenses are punishable as is theft. The prosecution, however, being for theft, and it being absolutely essential in support of that charge to connect the defendant with the original taking, to warrant his conviction, without such proof of connection any subsequent guilty connection with the stolen animal, such as a receiver of the same, or as the party who had illegally altered the mark and brand, would not be sufficient to warrant the conviction for theft.

"To inculcate a defendant as a principal offender in the crime of theft, the state must show that he had some connection with or complicity in the taking of the property. It does not suffice to prove that, subsequently to the taking and without complicity therein, but with knowledge that the property had been stolen, he aided the taker to dispose of it": *Cohea v. State*, 9 Tex. App. 173; *McAfee v. State*, 14 Id. 668; *Tucker v. State*, 21 Id. 699.

Without a very clear and positive understanding of this principle of law, it is manifest that an ordinary jury would be misled as to the character and weight to be attached to the subsequent inculpatory acts of defendant, though not connected with the original taking. Appreciating this danger, and to avoid it, defendant requested a special instruction, which the court refused, and which was in effect that, "before the jury can convict defendant they must believe beyond a reasonable doubt that he is guilty of the original fraudulent taking, and any subsequent connection after the taking would not be theft, either in good or bad faith; and if the jury believed that the defendant purchased the cow from Mixon or any other party, after the fraudulent taking, either in good or bad faith, he is not guilty of theft": *Clayton v. State*, 15 Tex. App. 348; *Barrett v. State*, 18 Id. 64; *Phillips v. State*, 19 Id. 159; *Morrow v. State*, 22 Id. 240; *Curlin v. State*, 23 Id. 681. It was error to refuse this instruction under the circumstances of the case: See Willson's Texas Criminal Laws, sec. 306.

As to the testimony of the accomplice Mixon, we are of the opinion the charge was not sufficiently explicit upon the character of the corroboration. Such testimony must be corroborated, not merely so as to show that such a crime as the one charged was committed, but the defendant's complicity in the crime committed: Code Crim. Proc., art. 741. The material matter in this case was the original taking,—in other words, the theft of the animal,—and whilst it may be that the subsequent acts of defendant would tend in some degree to show complicity in the original taking, and whilst as to these acts the accomplice testimony was corroborated, these acts, as we have seen, did not prove the original taking, and under the circumstances developed in this case they tended very slightly, if at all, to prove it; because, whatever of corroboration there is in the evidence is alone as to matters occurring subsequent to the crime charged; that is, subsequent to the original taking

or theft. As to the original taking, the accomplice himself professed to know nothing of it. It is a serious question, which we do not feel called upon now to answer, as to whether the corroboration in this case is of a character such as is contemplated by and would be held sufficient under the statute as to the main fact charged in this case: *Roach v. State*, 8 Tex. App. 478; *Harper v. State*, 11 Id. 1; *Dunn v. State*, 15 Id. 560. It certainly is not sufficiently conclusive, without proof *aliunde* of the main fact,—which fact, it is true, may be established by the recent possession, unexplained, of the stolen property.

For the errors we have pointed out, the judgment will be reversed, and the cause remanded.

POSSESSION OF RECENTLY STOLEN PROPERTY as evidence of guilt, question for the jury: *Hunt v. Commonwealth*, 70 Am. Dec. 447; *Stockman v. State*, ante, p. 894, and note 896. The principal case is cited in *Romero v. State*, 25 Tex. App. 396, and *Matlock v. State*, 25 Id. 658, to the point that possession of property, to raise the presumption of guilt, must be recent and unexplained, when an explanation is necessary. Remote possession does not raise such presumption, nor call for an explanation.

EVIDENCE OF ACCOMPLICE, whether must be corroborated to support conviction: See *Blakely v. State*, *infra*, and note.

UNCORROBORATED TESTIMONY OF ACCOMPLICE IS INSUFFICIENT TO JUSTIFY CONVICTION: See note to *Commonwealth v. Price*, 71 Am. Dec. 671-678; *People v. Kraker*, 1 Am. St. Rep. 65; *Bernhard v. State*, 76 Ga. 613; *Blakely v. State*, *infra*. And corroboration, to render conviction justifiable, must be of matters material to the issue: *State v. Chyo Chiagk*, 92 Mo. 395.

BLAKELY v. STATE.

[24 TEXAS APPEALS, 616.]

CRIMINAL LAW. — **ACCESSARY** is one who, knowing that an offense has been committed, conceals the offender, or gives him any other aid in order that he may evade arrest or trial, or the execution of sentence. But no person who aids an offender in making or preparing a defense, or procures him to be bailed, though he afterwards escape, is an accessary under the Penal Code of Texas.

CRIMINAL LAW. — **TO CONSTITUTE ONE ACCESSARY**, he need only aid the criminal to escape arrest and prosecution; it is not necessary that he aid him to effect his personal escape or concealment.

CRIMINAL LAW. — **ONE MAKES HIMSELF ACCESSARY** to murder, who immediately after the homicide held a private conversation with the murderer, after which the latter departed, and the accessary told the only witnesses present that they must swear to a certain fabricated state of facts at the inquest, so as to make it appear that the killing was justifiable in self-defense, and so that the murderer would be exonerated entirely, or put upon a very light bond to answer the charge.

CRIMINAL LAW. — WHETHER ONE IS ACCESSARY after the fact depends on whether what he did was personal help to his principal to elude punishment; the kind of help is unimportant; and if any assistance is given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, it is sufficient.

CRIMINAL LAW. — ACCOMPLICE CANNOT BE CONVICTED upon the testimony of an accomplice, unless corroborated by other evidence tending to connect defendant with the crime committed, and it is not sufficient if it merely shows the commission of the crime.

CRIMINAL LAW. — CONVICTION CANNOT BE HAD upon the uncorroborated evidence of two or more accomplices, and one accomplice cannot corroborate himself, nor can the evidence of one accomplice corroborate that of another.

CRIMINAL LAW — ACCOMPLICE. — WHERE WITNESS IMPLICATES himself in crime by agreeing to and swearing falsely concerning its commission, no matter what his motive, and his claim that he was coerced is immaterial, he is an accomplice, or *particeps criminis*.

Alexander, Winter, and Dickenson, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. This is a companion case to *May v. State*, 23 Tex. App. 146.

In the first count the indictment charges May with the murder of Derush Daffin; and in the second count the charge as set forth against this appellant is, that "after the commission of the aforesaid offense of murder by the said Erasmus May, as aforesaid, and well knowing the said Erasmus May to have committed said offense, Steve Blakely [the defendant] did then and there unlawfully, willfully, and feloniously conceal and give aid to the said Erasmus May, in order that he, the said Erasmus May, might evade an arrest and trial for said offense; and so the grand jurors aforesaid, upon their oaths aforesaid, do say that he, the said Steve Blakely, did then and there become and make himself an accessory to the murder and killing of the said Derush Daffin by the said Erasmus May, in the manner and form as aforesaid, contrary," etc. The indictment sufficiently charged the offense (Willson's Crim. Forms, No. 539, p. 232) under article 86 of the Penal Code, which defines the crime in the following language, viz.: "An accessory is one who, knowing that an offense has been committed, conceals the offender or gives him any other aid in order that he may evade an arrest or trial, or the execution of his sentence. But no person who aids an offender in making or preparing his defense at law, or procures him to be bailed, though he afterwards escape, shall be considered an accessory."

At appellant's trial in the court below, the matters proved in behalf of the prosecution to establish the crime alleged were objected to by defendant both as irrelevant and insufficient to the issue. It is insisted that the facts permitted to be proven did not go to show either that defendant concealed May, or that he gave him aid such as to enable him to evade an arrest or trial.

In brief, the facts proven were, that, immediately after the homicide, this defendant and May went off to themselves and had a private conversation, after which May mounted a horse and rode off. Defendant Blakely then told the only other two parties who were present that they must swear before the coroner's jury to a certain state of facts, which he then and there detailed, and that if they did so it would appear to said jury, and they would so find, that May was justifiable in self-defense in killing Daffin, and he would either be exonerated entirely or put upon a very light bond to answer the charge. Acting upon these suggestions, and through fear of May and defendant, the two witnesses did, at the coroner's inquest, swear, as did also Blakely, to the fabricated statement of the occurrence as devised by Blakely, and the result, as anticipated by Blakely, was, that May was subsequently placed under a nominal bond, and that the grand jury for several terms of the district court thereafter failed to indict him for the murder, and he was only indicted after it leaked out and was ascertained that the testimony given by the witnesses at the inquest was false and perjured. On May's trial under indictment for the murder, the two witnesses who had sworn on the inquest to the fabricated statement of Blakely testified that they had sworn falsely, and developed the reasons and inducements causing them to do so. They also stated, as they declared truthfully, the facts attendant upon the homicide as they actually did occur, and upon this their testimony, corroborated as it was by other evidence, May was convicted of murder of the first degree, and his punishment was affixed by the verdict and judgment of the court at a term of seventy-five years in the penitentiary,—which judgment on appeal was afterwards affirmed by this court: *May v. State*, 23 Tex. App. 146.

It is perhaps necessary that we should further state that after the conversation between May and defendant immediately following upon the killing, and after he had mounted a horse and ridden off, as above stated, May did not appear at

the coroner's inquest, nor was he seen for a day or so thereafter, until his appearance before the justice of the peace to enter into the nominal bond for his appearance, above mentioned.

On this appellant Blakely's trial as accessory, the two witnesses also testified as in May's case to the facts with regard to the fabricated testimony at the inquest, and to the facts as they really occurred.

The objections presented to this testimony are thus stated in the able brief of counsel for appellant, viz.:—

"We submit that under our statute the 'aid' given to an offender which the law denounces is something which relates to the personal conduct of the offender after the offense, or an aid which obstructs the operation of the law in its executive branch, such as concealing the person of the offender, or advising him how to escape pursuit; furnishing him means to make his flight; putting persons in pursuit off the track, and not an aid which causes justice to slumber, or perverts its course, such as compounding with a felon, concealing the transaction either by silence or by perverting the facts so as to make that appear innocent which in truth is not."

Mr. Bishop says "the true test whether one is an accessory after the fact is, whether what he did was by way of personal help to his principal to elude punishment, the kind of help being unimportant": 1 Bishop's Crim. Law, 7th ed., sec. 695. Mr. Wharton says: "Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, and punishment, is sufficient, it is held, to make a man an accessory after the fact": 1 Wharton's Crim. Law, 8th ed., sec. 241.

We are of opinion the facts we have stated, and upon which this case rests, bring it within the purview of the general law and our statute, *supra*, as to accessories. Appellant, if he did not in fact conceal May until the perjured testimony was given which justified him before the inquest, certainly aided him to the extent that he was not arrested and punished for his crime until the perjury was discovered, and but for the discovery the aid which defendant attempted to give him would have proven effectual in affording him perfect and complete immunity from apprehension, trial, and punishment for the murder he had committed.

It is true that under the facts disclosed defendant might have been prosecuted and convicted under our statute for subornation of perjury: Pen. Code, art. 199; but this fact did

not destroy nor affect his relation to the murder as an accessory; it was simply a question with the prosecution as to which of the offenses he should be tried for. We have discussed this branch of the case thus lengthily because of the fact that our statute as to accessories has never before been directly construed. The disposition of the case, however, on this appeal must turn upon another question.

The main issue in this case, in so far as this defendant was concerned, is, Did defendant fabricate the testimony? and did he induce the two witnesses, Nelson and Henderson, to swear to the same before the coroner's inquest? This question is the all-important one, and it is the primary one requisite in the establishment of his guilt as accessory to the murder. Without that essential fact being ascertained positively and conclusively, his guilt is not established.

Now, it is in proof that defendant and these two witnesses were alone present when the matters transpired with regard to the fabricated statement about which they have testified; that is, that he told them what they should swear, and induced them to swear it. In agreeing to do so, and in doing so, no matter what the motive, they made themselves accomplices, or *particeps criminis* in the offense which was committed by their false testimony. If a witness implicates himself, it is immaterial that he claims to have been coerced: *Davis v. State*, 2 Tex. App. 588; *Freeman v. State*, 11 Id. 92. Our statute declares that "a conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense": Code Crim. Proc., art. 741.

It is well settled that a conviction cannot be had upon the uncorroborated testimony of two or more accomplices: *Roberts v. State*, 44 Tex. 119; *Carroll v. State*, 3 Tex. App. 117; *Heath v. State*, 7 Id. 464. One accomplice cannot corroborate himself: *Hannahan v. State*, 7 Id. 664; and the evidence of one accomplice cannot be corroborated by that of another: *Heath v. State*, 7 Id. 464; *Gonzales v. State*, 9 Id. 374; *Phillips v. State*, 17 Id. 169.

Outside the accomplice testimony of the two witnesses, there is no evidence that defendant fabricated and procured and induced them to testify to the same on the coroner's inquest. No one else was present and heard him tell them so, or saw him when the purported statement was made to them by de-

defendant, or saw the parties together and under circumstances which would go to corroborate their testimony on this trial as to that fact.

On May's trial, the physical facts proven by other witnesses and other evidence directly contradicted and disproved the evidence at the coroner's inquest, and corroborated these accomplices in swearing that that evidence was untrue, and that what they testified criminating May on the trial was true. But that was a different case and a different issue from the one here presented. It is absolutely essential to the guilt of defendant in this proceeding that it should be proven that he told them what to swear, and induced them to swear it. Proof that it was false amounts to nothing if the first proposition be not established; because they might have sworn falsely of their own motion, and for aught that appears they might have persuaded defendant to do so, and in either event, defendant would not be guilty. The fact that the defendant himself swore on the coroner's jury, as they did, does not amount to a corroboration of their statement that he induced or made them swear as they did.

Under the law and the evidence, we are constrained to hold that the case against the appellant is not established with that certainty which would authorize us to permit it to stand as a precedent, because the accomplice testimony, upon which the conviction rests, has not been corroborated; wherefore the judgment must be reversed, and the cause remanded.

ACCESSARY AFTER FACT, WHAT NECESSARY TO CONSTITUTE: *Harrel v. State*, 80 Am. Dec. 95, and note 97; *Connaught v. State*, 60 Id. 370.

ACCOMPLICE, WHAT NECESSARY TO CONSTITUTE: *Cross v. People*, 95 Am. Dec. 474; *People v. Kraker*, 1 Am. Rep. 65.

ACCOMPLICE — CORROBORATION. — WHETHER UNCORROBORATED TESTIMONY is sufficient to convict, is a disputed question; that it is not, see *Ray v. State*, 48 Am. Dec. 379, and note 386; that it is sufficient, see *Commonwealth v. Price*, 71 Id. 668, and note 671; *State v. Holland*, 35 Am. Rep. 587; *Collins v. People*, 38 Id. 105; *Commonwealth v. Holmes*, 34 Id. 391; *Dunn v. People*, 86 Am. Dec. 319, and note; *State v. Stebbins*, 79 Id. 223, and note; *Cross v. People*, 95 Id. 474, and note.

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INDEX.

ADVERSE POSSESSION.

1. **NATURE OF, TO SET IN OPERATION STATUTE OF LIMITATIONS.** — One who sells a lot to be used as city property, which at the time is inclosed in a field, cannot successfully set up the statute of limitations against the grantee merely because the latter fails to take actual possession, and permits it to remain in the original inclosure. To make the plea of limitation effectual in such case, the vendor must show some notorious act of ownership over the property distinctly hostile to the claim of the grantee. *Evans v. Templeton*, 71.
2. **ID. — TO RENDER POSSESSION ADVERSE**, it must not only be actual, but also visible, continuous, notorious, distinct, and hostile, and of such a character as to indicate unmistakably an assertion of claim of exclusive ownership in the occupant. *Id.*
3. **IMPROVEMENTS — NOTICE.** — The mere fact that one takes possession of land with the owner's consent, makes a few improvements thereon, and then enters into an agreement for the purchase of the legal title, does not constitute that open, notorious, unequivocal, and exclusive possession under an apparent claim of ownership which is notice to a *bona fide* purchaser of the legal title, who goes into actual possession, and makes other and permanent improvements; and if such agreement is not acknowledged, filing it for record does not impart notice. *Sanford v. Weeks*, 748.
4. **POSSESSION OF VENDEE OF LAND UNDER TITLE BOND IS PRESUMPTIVELY ADVERSE** from the time he pays the purchase-money, and although the bond was executed by one having no title or authority to convey, and was not recovered, it may be good as color of title to show the character and extent of the possession asserted. *Woods v. Montavallo Co.*, 394.
5. **ACTUAL OCCUPATION AND IMPROVEMENT OF PORTION OF TRACT OF LAND**, by one who enters thereon with a deed or color of title to it, will usually be construed as a possession of the whole, co-extensive with the boundaries described in the written instrument under which he claims title, if there be no antagonistic possession, and especially where he makes a notorious claim to the whole by any acts suitably asserting his claim of ownership. *Id.*
6. **WHERE VENDOR CONVEYS TWO SEPARATE AND DISTINCT TRACTS OF LAND**, to only one of which he has title, an entry upon and occupation of that tract by the vendee will not, of itself, operate as a disseisin of the owner of the other tract to which the vendor had no title. Yet, in such case, the constructive possession of the vendee or occupant may become adverse by acts of dominion or ownership properly asserted over the other tract, in the absence of any actual possession by the true owner. *Id.*

7. To CONSTITUTE ADVERSE POSSESSION, the use made of the land must be suited to its nature, adaptability, and locality. All that the law requires is, that the possession, or rather the acts of dominion by which it is sought to be proved, shall be of such a character as may be reasonably expected to inform the true owner of the fact of possession and adverse claim of title. *Id.*
8. QUESTION OF ADVERSE POSSESSION IS FOR THE JURY, in view of all the evidence, and it is error to withdraw it from their consideration. *Id.*
See EASEMENTS; GRANTS.

AFFIDAVITS.

- IT IS SUFFICIENT COMPLIANCE WITH STATUTORY PROVISION that all affidavits "shall be in writing, and signed by the party making the same," that the signature of the affiant, instead of being affixed below the body of the affidavit, and above the jurat, appears below the official signature of the notary. *Kohn v. Washer*, 28.
See ATTACHMENTS, 1.

AGENCY.

1. WRITTEN AUTHORITY, WHEN NECESSARY. — Under Alabama statute of frauds (Code of 1876, sec. 2145), no legal title to lands will pass by or under a contract made with an agent, unless the agent has "a written authority." *Alabama G. S. R. R. Co. v. South & N. R. R. Co.*, 401.
2. ALTHOUGH AGENT OF CORPORATION CAN CONVEY NO LEGAL TITLE TO LAND unless his authority is in writing, yet the directors or governing body may so act as to estop themselves from denying the existence of such written authority, and thus create an equitable estoppel *in pais*; as, where the agent acted openly and notoriously, and the corporation for a long time acquiesced in his acts. *Id.*
3. AUTHORITY TO AGENT TO SELL LAND for one half cash, and the other half "payable on or before one year," authorizes a sale for one half cash, and the other half "payable in one year," and the principal is bound thereby. In either case the vendor would be entitled to demand payment in one year, and not before. *Deakin v. Underwood*, 827.
4. AGENT AUTHORIZED BY PRINCIPAL TO SELL LATTER'S LAND FOR SPECIFIED NET SUM, and to receive for his services all above that sum for which he might sell, is bound to disclose to his principal a fact in the condition of the land increasing its value which he afterwards learns, and of which his principal was ignorant when he fixed the price; and a sale by him on the basis of the sum fixed, without giving such information, is a fraud. And the purchaser being cognizant of the fraud, the principal, in order to rescind the sale, need tender a return of only what he received, and need not include in the tender what the agent received and retained. *Hagenmeyer v. Marks*, 808.
5. RATIFICATION OF CONTRACT ENTERED INTO BY PERSON ACTING AS AGENT, BUT WITHOUT AUTHORITY SO TO DO, made by the person for whom he assumed to act as principal, cannot validate the contract so as to bind the other contracting party without his assent. *Atlee v. Bartholomew*, 103.
6. THERE CAN BE NO RATIFICATION OF FORGED PROMISSORY NOTE which can be held binding upon person whose name was forged, in the absence of an estoppel *in pais*, or without a new consideration for the promise. *Henry v. Heeb*, 613.

7. **RATIFICATION. — If ONE WHO ASSUMES TO ACT AS AGENT SIGNS ANOTHER PARTY'S NAME** under pretense or color of authority, ratification, understanding, either by an express promise to pay or by accepting a chattel mortgage as indemnity, would be equivalent to previous authority. *Id.*
8. **RATIFICATION WHICH THE LAW INTERDICTS RELATES ONLY TO SUCH ACTS** as clearly appear to have been done in violation of a criminal statute, the motive of the ratifying party being presumably the concealment of the crime or the suppression of its prosecution. *Id.*
9. **UNAUTHORIZED SIGNATURE TO NOTE. — WHERE THE ACT RATIFIED IS OF AN AMBIGUOUS CHARACTER**, and may as well be attributed to a mistaken assumption of authority as to a purpose to commit a crime, public policy does not forbid the adoption or ratification of the act; nor can it be said to be without consideration where indemnity has been accepted. *Id.*
10. **DECLARATIONS OF AN AGENT ARE ADMISSIBLE AGAINST HIS PRINCIPAL** if the latter has designated the former as a person who could be trusted, and through whom reports would be made, and the declarations are part of a report made by him. *Barkly v. Copeland*, 413.

See **PARTNERSHIP**, 4; **TELEGRAPHS**; **TRUSTS**.

ANIMALS.

See **COMMON CARRIERS**.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

UNDER PROVISIONS OF MINNESOTA STATUTE, LAWS OF 1881, CHAPTER 148, RELATING TO assignments for benefit of creditors, an assignee may avoid transfers and chattel mortgages of the assignor, which the latter's creditors could avoid. *Merrill v. Ressler*, 822.

See **BANKRUPTCY AND INSOLVENCY**, 1, 2.

ASSUMPSIT.

BURDEN OF PROOF. — WHERE MONEY IS DELIVERED BY ONE PERSON TO ANOTHER, WITHOUT CONSIDERATION, to be applied to the use of a third person, the order to apply may be countermanded by the depositor at any time before the money has been appropriated to the uses intended, and in an action by him for the money, the burden is on the defendant to show that he had applied it as directed. *Thweatt v. McCullough*, 391.

ATTACHMENT AND GARNISHMENT.

1. **PRACTICE. — ATTACHMENT PROCEEDINGS MAY PROPERLY BE QUASHED, WHERE AFFIDAVIT** fails to show, as required by statute, that the property sought to be reached was subject to execution. *Blair v. Smith*, 593.
2. **PRACTICE — AMENDING RETURNS. — Liberal discretion is reposed in the court upon due notice to parties adversely interested to amend returns on process.** A sheriff's return may be amended after as well as before his term of office has expired; nor is it a valid objection to such amendment that an action based on the return is pending against the sheriff; and such return may also be amended, although judgment has been rendered in the action, and nearly fifteen months have elapsed since the return was made. *Jeffries v. Rudloff*, 654.

3. It is not requisite to the validity of a levy of attachment on real estate that the officer should go upon the land, or into its vicinity, in making the levy. The lien acquired upon property attached dates from the time the officer indorses the levy on the writ; and without such indorsement the levy is invalid, whatever other acts may have been performed by the officer in making it. *Riordan v. Britton*, 37.
4. LEVY UNDER WRIT OF ATTACHMENT IS NOT VOID AS AGAINST CREDITOR CLAIMING under a junior attachment, because of an insufficient description of the property, the description given at the time the levy was indorsed upon the writ and signed by the officer being, "also storehouse and lots," it being conclusively shown that the attorney for the junior attaching creditor well knew what property was intended to be, and actually was, levied on. *Id.*
5. LIEN OF ATTACHMENT IS NOT FORFEITED BY DELAY IN RETURNING WRIT, which was issued in February, 1882, and returned in January, 1883, it appearing that the attorneys for the attaching creditor used due diligence and made repeated efforts to procure the return of the writ. *Id.*
6. ORDER DISCHARGING GARNISHEE ON EXECUTION IS NOT A BAR to an action upon the judgment, whereby it is sought to reach real estate, the title to which is in the garnishee, to whom it is alleged to have been conveyed in fraud of creditors. A garnishment proceeding under the Iowa Code, sections 2986 and 2988, is entirely distinct from and does not involve the same question as such action on the judgment, nor is it intended to reach real estate, or to warrant a money judgment for its value. *Boyle v. Maroney*, 657.

ATTORNEYS AT LAW.

1. CHANGING OF SIDES BY AN ATTORNEY AT LAW WHO HAS REPRESENTED ONE OF THE LITIGANTS at a former trial of the cause ought not to be permitted by the court; and if permitted, this is an irregularity on account of which a new trial should be granted. *Weidekind v. Tuolumne W. Co.*, 445.
2. FAILURE OF CLIENT TO PAY HIS ATTORNEY FOR SERVICES RENDERED IN THE CASE will not justify the latter in appearing at subsequent stages of the cause as attorney for the adverse party. *Id.*
3. ATTORNEY AS SURETY. — RULE OF COURT IN TEXAS, providing that "no attorney or other officer of the court shall be surety in any cause pending in court, except under special leave of the court," is merely directory; and if such officer or attorney become a surety in contravention of the rule, his act is neither void nor voidable. The purpose of the regulation is sufficiently accomplished by punishing the offender for contempt of court, without holding the bond a nullity. *Kohn v. Washer* 28.

BANKRUPTCY AND INSOLVENCY.

1. ASSIGNMENT OF PROPERTY, MADE PURSUANT TO A BANKRUPT ACT, the assignee being in effect an officer of the court, and the assigned property being *in custodia legis*, and administered by and under direction of the court, has no extraterritorial effect so as to defeat an attachment levied upon property in another state, under the laws of that state, by a creditor of the assignor. *McClure v. Campbell*, 220.
2. CONFLICT OF LAWS. — ASSIGNMENT BY DEBTOR HAVING PROPERTY IN BOTH WISCONSIN AND MINNESOTA, made under the insolvent law of the latter state, does not affect property of the assignor situated in Wisconsin. *Id.*

3. **DISCHARGE IN INSOLVENCY OR BANKRUPTCY, IF NOT PLEADED**, is waived. If pleaded, but disregarded by the court, and judgment entered against the insolvent, it is conclusive of his liability while it remains in force, although the debt on which it was founded may have existed before the petition in insolvency or bankruptcy was filed. *Waggle v. Worthy*, 440.

BANKS AND BANKING.

1. **TRUSTS — TRANSACTION CREATING RELATION OF TRUSTEE AND CESTUI QUE TRUST.** — In the course of dealings between a New York and Texas bank, the former was in the habit of discounting notes for, and of forwarding them, on maturity, to the latter, "for collection and return," with the understanding that the proceeds of such discount notes should be preserved by the Texas bank as the property of the New York bank, and returned to it as such. The Texas bank, having received notes from its New York bank correspondent "for collection and return of proceeds," would become, as to such collections, when made by it, a trustee for the New York bank, and its duty would be to remit the proceeds of the notes to the latter. The relation created by the transaction is that of trustee and *cestui que trust*, and not that of debtor and creditor. *Continental Nat. Bank v. Weems*, 85.
2. **IN SUCH CASE TRUST FUND IS NOT DIVESTED OF ITS CHARACTER AS SUCH** by being placed by the collecting bank in its vaults, and there mingled with its other moneys; and the collecting bank thereafter becoming insolvent, the trust would attach to whatever money remained in the bank vaults when the receiver was appointed. *Id.*
3. **BANKER HAS NO LIEN UPON FUNDS IN HIS HANDS FOR INDEBTEDNESS** of a customer, in the absence of a contract for that purpose, either express or implied. And where notes are sent to a bank for discount, the proceeds to be placed to the credit of its correspondent, and the bank refuses to discount the paper, but pays drafts drawn by its correspondent in the belief that the paper had been discounted, it has no lien upon the paper for its reimbursement. In settling with a receiver of its correspondent in such case, the bank is properly chargeable with the moneys collected upon the paper, and with the value of so much of it as remained unpaid, to be set off by the amount of the drafts drawn upon it by its correspondent after the notes were forwarded for discount. *Id.*
4. **IT IS DUTY OF DEPOSITOR TO KNOW WHETHER HIS ACCOUNT WITH BANK IS CORRECT OR NOT**, and promptly to report a forgery when detected; and if he negligently fails to make the examination and consequent discovery when he could have done so, it is as if he had expressly admitted the genuineness of the checks, and he will not be permitted to deny the fact, provided the bank be prejudiced by the failure. *Weinstein v. Nat. Bank*, 23.
5. **BANK IS NOT LIABLE TO DEPOSITOR FOR MONEY PAID ON FORGED CHECKS**, where, by reason of the depositor's negligence and delay in examining his account and reporting the forgeries, the bank loses the opportunity of recovering the money which it would have had if the discovery and report had been made in a reasonable time. *Id.*
6. **PLEADING AND PRACTICE — PLEA OF ESTOPPEL.** — In a suit by a depositor against a bank to recover an amount paid by the bank on forged checks drawn in the depositor's name, a plea alleging that the plaintiff, having received his pass-book and checks, and having failed to detect and denounce the forgeries within a reasonable time, was thereby estopped from

questioning the correctness of the account, is bad, inasmuch as it fails to allege or show any injury or loss to the defendant occasioned by or resulting from such delay. *Id.*

7. IN ACTION AGAINST BANK TO RECOVER AMOUNT PAID ON FORGED CHECKS, a plea by way of estoppel, averring that by reason of "the negligence and failure" of the plaintiff to examine the account and report any errors or forgeries therein, the defendant was "debarred the right and opportunity of protecting itself," is good on general demurrer. But a special exception on account of vagueness and generality, if filed, should be sustained. *Id.*

BANKS AND BANKING.

1. DEFENDANT WHO WOULD AVAIL HIMSELF OF DEFENSE OF PURCHASER FOR VALUE without notice must put it in issue by his pleadings; otherwise the court cannot consider and allow it, although the evidence may show that he could have maintained that defense had he set it up by his plea, or by his answer. *Rorer Iron Co. v. Trout*, 285.
2. DEFENDANT CLAIMING TO BE PURCHASER FOR VALUE WITHOUT NOTICE MUST EXPRESSLY DENY NOTICE in his plea or answer, though it is not charged in the bill. *Id.*
3. WHATEVER PUTS PURCHASER ON INQUIRY IS EQUIVALENT TO NOTICE. And possession of the property by a person other than the vendor is sufficient to put a purchaser on inquiry, and to affect him with knowledge of the claims of the possessor. *Id.*
4. PURCHASER WHO BUYS IN IGNORANCE OF PRIOR UNRECORDED DEED, not having paid the purchase-money in full, is not a *bona fide* purchaser, and can claim no equity arising from the alleged negligence of the prior purchaser in failing, after the destruction of his deed and the records of the county, to have his title established and his conveyance again recorded. *Evans v. Templeton*, 71.

BONDS.

1. OFFICIAL BONDS. — Where a bond is delivered to third persons, who afterwards deliver it to the obligee, and such bond is not deposited as an escrow, it cannot be avoided by the sureties upon the ground that they signed the bond upon the condition that it should not be delivered unless it should be executed by other persons, who did not execute it, and that the ownership of more property should be qualified to, which was not done, when it appears that the obligee had no notice of such conditions, and there is nothing in the bond or the manner of its execution to put him on inquiry, and also that he has been induced upon the faith of such bond to act to his own prejudice; nor is there enough in the fact that it did not appear on the face of the bond that the sureties had qualified to the ownership of sufficient property to afford any warrant for the inference that the agreement alleged had been made, nor is the bond invalid on that account: Iowa Code, sec. 688. *Taylor Co. v. King*, 666.
2. IF MUNICIPAL BONDS ARE ISSUED WITHOUT ANY AUTHORITY, there can be no *bona fide* holding of them, nor can there be any estoppel or ratification which will preclude the municipality or its officers from denying their validity. Hence the action of the board of supervisors (when they are county bonds) ordering them to be redeemed is of no consequence. *Id.*

3. MUNICIPAL BONDS ISSUED IN EXCESS OF THE NUMBER AND AMOUNT authorized by law are void. *Sutro v. Pettit*, 442.

See CORPORATIONS, 4, 5; GUARDIAN AND WARD, 2, 3; SURETIES.

BOUNDARIES.

1. RIVER AS A BOUNDARY BETWEEN STATES. — If a river is declared by statute or other law to be the boundary between states, the river, "as it runs, continues to be the boundary," although it may change imperceptibly from natural causes. But if the river suddenly changes its course or deserts its natural channel, the boundary remains where it was before, in the middle of the deserted river-bed. *Butternuth v. St. Louis B. Co.*, 545.
2. WHERE A RIVER IS A BOUNDARY BETWEEN STATES, IT IS THE MAIN OR PERMANENT RIVER which constitutes the boundary, and not that part which flows in seasons of high water and is dry at other times. *Id.*
3. PHRASES "MIDDLE OF THE RIVER" AND "MIDDLE OF THE MAIN CHANNEL," when employed to designate the boundary between states, both signify the mean center line of the main channel, — or, as it is more frequently expressed, the "thread of the stream." *Id.*
4. THE "CHANNEL" IS THE BED OF A STREAM OF WATER, especially the deeper part of a river or bay where the main current flows. When employed in treating of subjects connected with the navigation of rivers, it indicates the line of deep water which vessels follow, — the space within which vessels may and usually do pass. *Id.*
5. THE BOUNDARY BETWEEN THE STATES OF ILLINOIS AND MISSOURI is the thread of the main stream of the Mississippi River. *Id.*
6. WHERE A NAVIGABLE RIVER FORMS THE BOUNDARY LINE BETWEEN STATES, BOTH ARE PRESUMED TO HAVE THE FREE USE OF IT, AND THE DIVIDING LINE WILL RUN IN THE MIDDLE OF THE CHANNEL, unless the contrary is shown by long occupancy or agreement of parties. Each state holds to the center thread of the main channel or current along which vessels in the carrying trade pass, — that is, to the channel of commerce, not the shallow water of the stream, which, at some seasons of the year, may be impossible of navigation. *Id.*

BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING ASSOCIATION CANNOT DISSOLVE ITSELF BY ITS OWN RESOLUTION without the consent of all the share-holders, where the articles of association do not authorize the corporation to close its existence short of eight years unless all stock is redeemed at its value, and that period has not elapsed nor the stock been all redeemed. *Barton v. Enterprise etc. Co.*, 608.
2. RECEIVER OF BUILDING ASSOCIATION WILL NOT BE APPOINTED where there are no assets to be distributed, and where all the share-holders agreed that advancements of money made to members, where they took the same and paid all dues and interest, should be theirs absolutely, and if they agreed to take the money advanced to them in full for their stock, they should not be required to pay back money advanced, then mortgages taken for money so advanced cannot be enforced, and there are no assets to be distributed. *Id.*

BURGLARY.

See CRIMINAL LAW, 19.

CHattel MORTGAGES.

See MORTGAGES.

COMMON CARRIERS.

1. INSTRUCTION THAT DUTY OF COMMON CARRIER TO ITS PASSENGERS REQUIRED it "to exercise the utmost care, skill, and vigilance to carry plaintiff safely, and to protect him against any and all danger, from whatever source arising, so far as the same could, by the exercise of such a degree of care and vigilance, have been reasonably seen and prevented," was held to state the law with sufficient accuracy, under the circumstances of the case on trial. *Chicago etc. R. R. Co. v. Pillsbury*, 483.
2. CARRIER OF PASSENGERS IS NOT AN INSURER OF THEIR ABSOLUTE SAFETY. Its liability is limited by care and diligence. *Id.*
3. DEGREE OF CARE WHICH COMMON CARRIER OF PASSENGERS MUST OBSERVE FOR THEIR SAFETY IS A QUESTION OF LAW. *Id.*
4. CARRIER OF PASSENGERS MUST EXERCISE THE HIGHEST REASONABLE AND PRACTICABLE SKILL, CARE, AND DILIGENCE in selecting suitable machinery and cars, in keeping its road in a fit and proper condition, both as to manner of construction and materials used, in using all appliances adopted for the government of moving trains, and in employing and retaining competent and faithful servants. *Id.*
5. CARRIER OF PASSENGERS IN GUARDING THEM FROM DANGERS NOT INCIDENT TO ORDINARY TRAVEL is not required to exhibit as high a degree of care and skill as in protecting them from other dangers. The carrier must, however, omit no care to discover and prevent danger to its passengers that is reasonable and practicable. *Id.*
6. DEGREE OF CARE WHICH CARRIER OF PASSENGERS MUST EMPLOY IN DISCOVERING AND PREVENTING DANGER NOT INCIDENT TO ORDINARY TRAVEL varies with the circumstances of each particular case. In many cases, if he observes such ordinary care and diligence as a prudent man would for his personal safety, this will exonerate him from liability. In other cases, it is the duty of the carrier to exercise the utmost care, skill, and diligence to protect his passengers from danger and injury, so far as the same, by the exercise of such care, skill, and diligence, could have been reasonably and practicably foreseen and anticipated in time to prevent injury. *Id.*
7. CARRIERS OF PASSENGERS MUST IN NO CASE EXPOSE THEM TO EXTRA-HAZARDOUS DANGERS which might readily be discovered or anticipated by all reasonable, practicable care and diligence. *Id.*
8. CARRIER OF PASSENGERS IS ANSWERABLE FOR INJURIES INFLICTED BY A MOB ON ONE OF HIS PASSENGERS, when such mob consisted of striking workmen enraged against non-union men employed in their stead, and the existence of the mob, and of its fierce, lawless, and vindictive spirit, was well known; and the train was stopped at a place where it was not required by law to stop, and non-union men were there taken into one of the cars, wherein a passenger was subsequently injured during an attack by the strikers on the non-union men so admitted therein. *Id.*
9. CARRIER OF PASSENGER IS CHARGEABLE WITH NEGLIGENCE IF HE STOPS HIS TRAIN AND PASSENGERS, IN THE MIDST OF A HOWLING, REVENGEFUL, LAWLESS MOB, to take on persons whom the mob are seeking an opportunity to maltreat. *Id.*

10. **SLEEPING-CAR COMPANY IS BOUND TO EXERCISE REASONABLE CARE** in guarding passengers from theft, and if through the want of such care the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor. *Pullman Palace Car Co. v. Pollock*, 31.
11. **COMPANY OWNING AND OPERATING SLEEPING-CAR IS STILL PASSENGER CARRIER**, and is liable as such, notwithstanding the fact that the main compensation for the passenger's transportation was received by the railway company, to whose train the sleeping-car was attached. *Id.*
12. **IF PASSENGER RETAINS EXCLUSIVE CUSTODY OF HIS BAGGAGE**, CARRIER IS NOT RESPONSIBLE for its loss, unless such loss results from the carrier's negligence, and the failure of the passenger to use reasonable care in reference to it will defeat his right to recover. *Id.*
13. **NEGLIGENCE — WHEN STREET-RAILWAY COMPANY UNDERTAKES TO CARRY LARGE NUMBERS OF PEOPLE** vastly in excess of the seating capacity of its cars, and permits passengers to ride on the platforms and foot-boards without objection, and collects fare from them, and stops its cars when in such crowded condition that no seats are attainable, and permits persons to get upon them and to be carried from place to place, and when the cars are in such crowded condition, with passengers riding on the foot-boards, runs them so near the intersection of a switch with the main track that they cannot pass without injury to the passengers, the company is guilty of gross negligence. *Topeka C. R'y v. Higgs*, 754.
14. **STREET-RAILWAY COMPANIES AS CARRIERS OF PASSENGERS ARE BOUND TO EXERCISE ALL POSSIBLE SKILL, FORESIGHT, AND CARE** in running their cars, so that passengers may not be exposed to danger on account of the manner in which the cars are run, and such skill and care include the exercise of every reasonable precaution to prevent injuries to passengers, and implies that there shall be good tracks, safe cars, careful management, and judicious operation in every respect. All possible foresight means more than this; it means anticipation if not knowledge that the operation of street-cars will result in danger to passengers, and that there must be some action with reference to the future, a provident care to guard against such occurrences, a wise foresight and prudent provision that will avert the threatened evil, if human thought or action can do so. *Id.*
15. **DEGREE OF CARE TO BE EXERCISED BY CARRIERS OF PASSENGERS.** — The rule requiring highest skill and care in carrying passengers applies to its full extent, not only to steam-cars, but to street-cars and other vehicles drawn by horses, the difference being in the means and instrumentalities used, to prevent accident by reason of the mode rather than to the degree in which the preventive means are to be employed. To each mode of conveyance must be applied the greatest degree of skill, care, and foresight of which they are susceptible. *Id.*
16. **NEGLIGENCE. — INVITATION TO A PERSON TO RIDE IN A DANGEROUS PLACE**, given by the servants of a railway company, may render his apparent want of care in riding in such place the negligence of the carrier. He had a right to assume that its servants knew what was safe, provided the act which he did on their advice did not involve a reckless exposure of himself, and was not one which no man of ordinary prudence would do. *Lake Shore etc. R. R. Co. v. Brown*, 510.
17. **WHERE ONE IS PUT IN A PLACE OF PERIL BY THE INVITATION OF THE SERVANTS OF A RAILWAY COMPANY**, the law requires them to exercise

- a degree of care corresponding to the danger to which they have exposed him. If they are about to make "a running switch," or do any other act fraught with special peril to him, they must advise him of the impending danger, and give him an opportunity to guard against or escape from it. *Id.*
18. **THOUGH A RAILWAY CAR IS NOT OPERATED FOR THE PURPOSE OF CARRYING PASSENGERS**, yet if a person takes passage therein by the invitation of servants in charge thereof, they thereupon become bound to operate the train in such manner as due care and caution would suggest for his safety. *Id.*
 19. **NOTICE OF PRIVATE RULES AND REGULATIONS OF A RAILWAY COMPANY**, prescribing the duties and powers of its employees, must be brought home to the knowledge of persons before they can be affected thereby. *Id.*
 20. **SHIPPER ON RAILWAY HAS THE RIGHT TO ASSUME** that persons found in charge of the train and of his property are authorized to act for the company, and he is not bound to stop and inquire as to the extent of their authority. *Id.*
 21. **CUSTOM OF ALLOWING SHIPPERS OF LIVE-STOCK TO RIDE UPON ENGINES**, and upon cars containing such stock, is admissible in evidence as tending to show that the plaintiff, who was such a shipper, had a right to be so carried, and that the servants of the company who so carried him did so by its authority. *Id.*
 22. **FACT THAT INJURED RAILWAY PASSENGER MIGHT HAVE AVOIDED DANGER BY PURSUING ANOTHER AND DIFFERENT MODE OF TRAVEL** will not relieve the company from liability if its servants invited him to ride on its cars in a position of danger, and exposed him to injury by their want of care. *Id.*
 23. **PASSENGER GUILTY OF SLIGHT NEGLIGENCE MAY, NEVERTHELESS, RECOVER** for a personal injury resulting from the gross negligence of the carrier. *Id.*
 24. **CARRIERS OF PASSENGERS. — CONDUCTOR'S DUTY DOES NOT REQUIRE HIM TO ASSIST FEMALE PASSENGER** to alight from the car with her two small children when she reaches her destination. The conductor is required, after having at a proper time announced the station, to stop the train, and hold it such reasonable time as will permit passengers to alight in safety. The law does not require him to know that all passengers intending to stop at the station have alighted in safety. *Raben v. Central Iowa R'y Co.*, 708.
 25. **RAILROAD COMPANY MAY ADOPT REGULATION THAT CERTAIN TRAIN SHALL NOT STOP AT DESIGNATED STATIONS** where there is no statutory provision to the contrary. *Atchison etc. R'y Co. v. Gants*, 780.
 26. **RAILROAD PASSENGER MUST INFORM HIMSELF WHETHER TRAIN STOPS AT STATION**. It is the duty of a person about to take passage on a railroad train to inform himself when, where, and how he can go or stop according to the regulations of the company. *Id.*
 27. **DUTY OF PASSENGER TO PAY EXTRA FARE—RIGHT OF CONDUCTOR TO EJECT PASSENGER. —** Where, in the absence of statutory provisions to the contrary, regulations are made by a railroad company that a fast passenger train shall only make certain stoppages, and a person by mistake or wrongfully takes passage thereon for a station where the train does not stop, it is his duty, when demand is made therefor, to pay the extra fare which in addition to the sum paid for his ticket would have entitled him to ride to the first stopping-place beyond, and if he refuses to do this,

the conductor has the right to stop the train and require such passenger to leave it. *Id.*

28. CARRIERS OF PASSENGERS — PAYMENT OF EXTRA FARE — DAMAGES. — Where mistake of passenger in getting on train which did not stop at his station is induced by the company's ticket agent, and he is compelled to pay extra fare to first place of stoppage, such extra fare would be a proper element of damages in addition to such as were occasioned by the failure to take him to the station to which he was going. But if after boarding the train, and before it started, correct information was afforded him, by the announcement of the brakeman or otherwise, such as a reasonable and prudent man would not neglect, he could not thereafter rely upon the incorrect statements of the agent. *Id.*
29. RAILROAD PASSENGER MAY NOT ASSERT AND MAINTAIN BY FORCE HIS RIGHTS TO TRANSPORTATION ON TRAIN. If he is a trespasser, it is his duty to go off without being forced to do so, and he has no legal right to forcibly resist the conductor's rightful efforts to eject him. If he is on the train by mistake induced by an agent of the company, it is not necessary in such case for him to invite force to be exerted by the conductor to secure his rights, — certainly not to increase his damages. *Id.*
30. RAILROAD PASSENGER MAY BE EJECTED FROM TRAIN AT PLACE OTHER THAN DEPOT or station, provided care is taken not to expose his person to serious injury or danger. The company is not required to consider the mere convenience of the wrong-doer. *Id.*
31. CARRIERS OF PASSENGERS — EJECTING PASSENGER FROM TRAIN — MEASURE OF DAMAGES. — Where passenger resists to the utmost of his power and ability an attempt to eject him from the train, he ought not to complain of the force used if there was no intention on the part of the conductor or his assistants to commit unnecessary injury, even if his resistance might have been overcome with something less of force than was actually used. But if such passenger, although a trespasser upon the train, received injuries which were the direct and necessary result of willful, wanton, or malicious acts of the conductor or those assisting him, he is entitled to his damages. *Id.*
32. EVIDENCE AS TO WHETHER PERSON WAS OR WAS NOT ACCUSTOMED TO USE PROFANE AND OBSCENE LANGUAGE is incompetent and immaterial upon question whether such person in being ejected from railroad car had used such language. *Id.*
33. CONDUCTOR REPRESENTS COMPANY ONLY AS TO HIS OWN TRAIN. — A conductor in the line of his duty in collecting fare, taking up tickets, and in giving information to the passengers on his train, represents the company only as to the running and operation of his own train. *Id.*
34. EJECTION FROM RAILROAD TRAIN WITH AID OF PASSENGERS — RESPONSIBILITY OF COMPANY THEREFOR. — It is not necessary that conductor should have expressly directed passengers to aid in ejection, but if such aid was rendered by passengers with the permission and sanction of the conductor or the train-men, an employment might rightfully be inferred, otherwise where the passengers were mere interlopers, and the conductor had no opportunity to interfere with their actions. *Id.*
35. RULE OF DAMAGES FOR WRONGFUL EXPULSION FROM RAILROAD TRAIN is, that passenger may recover for his time, inconvenience, the necessary expenses to which he is subjected, and if treated with violence or in an insulting manner, for the injuries to his person and feelings. If the expulsion be malicious, or through negligence which is gross and wanton,

then exemplary damages may be awarded. *Southern Ry Co. v. Rice*, 766.

36. **CARRIER OF PASSENGERS — TICKET LIMITING LIABILITY FOR BAGGAGE.** — Before one can be bound by the declarations in a ticket for transportation on a passenger train, limiting liability for baggage checked by reason of the purchase of such ticket, the restrictions or limitations sought to be made must be known to the purchaser, and the ticket must have been accepted with full knowledge of the restrictions contained therein. *Kansas C. etc. Co. v. Rodebaugh*, 715.
37. **COMMON CARRIER OF LIVE-STOCK, WHAT CONSTITUTES.** — Railroad company engaged in transporting live-stock over its road, and accustomed to furnish suitable cars therefor, upon reasonable notice, whenever within its power to do so, and holding itself out to the public as such carrier for hire upon the terms and conditions prescribed in the written contracts with shippers, is a common carrier of live-stock, with such restrictions and limitations of its common-law liability as arise from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals under such contracts of carriage. *Ayres v. Chicago*, 226.
38. **COMMON CARRIER OF LIVE-STOCK FOR HIRE**, holding itself out to the public as such, under the restrictions and limitations named in its contracts with shippers, is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence, without jeopardizing its other business as such common carrier. *Id.*
39. **BURDEN OF PROOF IS UPON COMMON CARRIER OF LIVE-STOCK** to show that it could not, with reasonable diligence and without jeopardizing its other business, have furnished cars for the transportation of such stock at the time ordered and upon the notice given. *Id.*
40. **COMMON CARRIER OWES SAME DUTY RELATIVELY** to all shippers at stations of the same business importance as to supplying cars, and no station, much less any one shipper, has the right to command the entire resources of the carrier to the exclusion of other stations and shippers, but the cars must be so distributed at the different stations as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. *Id.*
41. **COMMON CARRIERS OF LIVE-STOCK — DUTY TO FURNISH CARS ON NOTICE.** — Where a shipper applies to a carrier of live-stock for cars to be furnished at a time and station named, the carrier must inform the shipper within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying thereon, is present with his live-stock at such time and place, and finds no cars, the carrier is liable in damages. *Id.*
42. **DAMAGES AGAINST COMMON CARRIER OF LIVE-STOCK** for delay in transportation is limited to the expense of keeping, shrinkage, and depreciation in value of the stock during such delay. *Id.*

CONDITIONS.

See DEEDS, 2, 3.

CONFESSIONS.

See CRIMINAL LAW.

CONFLICT OF LAWS.

See BANKRUPTCY AND INSOLVENCY.

CONSPIRACY.

See CRIMINAL LAW.

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW. — STATUTE REGULATING SALE OF COMMERCIAL FERTILIZERS, if its controlling purpose is to guard the agricultural public against spurious and worthless compounds sometimes sold as fertilizers, and to furnish to buyers cheap and reliable means of proving the deception and fraud should such be attempted, is clearly constitutional. *Steiner v. Ray*, 332.

See CORPORATIONS, 7, 8; MUNICIPAL CORPORATIONS.

CONTEMPT.

IT IS A CONTEMPT OF COURT TO OBSTRUCT AND TAKE FROM A POLICE OFFICER, UNDER LEGAL PROCESS, PERSONAL PROPERTY TAKEN BY HIM UNDER A SEARCH-WARRANT issued by the presiding judge of such court, for the purpose of securing certain documents alleged to have been used in committing a felony. *In re Lowenthal*, 424.

CONTRACTS.

1. **CONTRACT MUST BE BINDING ON BOTH PARTIES TO SUSTAIN an action at law** by either to recover for a breach thereof. *Atlee v. Bartholomew*, 103.
2. **ACCEPTANCE OF AN OFFER, AFTER THE TIME LIMITED IN SUCH OFFER,** cannot bind the person making the offer, unless he assents to the acceptance after knowledge that it was not made within the time limited. *Id.*
3. **ORAL EXTENSION OF TIME WITHIN WHICH AN OFFER TO SELL REAL ESTATE MIGHT BE ACCEPTED** cannot be shown, because the whole of the contract for the sale of real estate must be in writing. *Id.*
4. **CONTRACTS — CONSTRUCTION. — RULE OF INTERPRETATION OF DEEDS OR OTHER INSTRUMENTS,** partly printed and partly written, is, that the written parts are presumed to have commanded the stricter attention of the parties; and, in case of irreconcilable conflict, the writing will prevail over the printed matter. *Thornton v. Sheffield & B. R. R. Co.*, 337.
5. **TIME IS ESSENTIAL ELEMENT OF WRITTEN CONTRACT,** whereby one person binds himself to convey a right of way to certain other persons, on condition that the latter shall, within four months from the date of the contract, commence the construction of a railroad, and within three years complete it through certain counties; and upon failure to perform these conditions, damages are recoverable for the right of way. *Id.*
6. **CONTRACT. — ONE WHO HAS AGREED THAT HE WILL ONLY CONTRACT BY WRITING** in a certain way does not thereby preclude himself from making a parol bargain to change it. There can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing, and every such agreement is ended by the new one which contradicts it. *Morrison v. Insurance Co.*, 63.
7. **CONTRACT — CONSIDERATION. — TRIPARTITE AGREEMENT BETWEEN LAND COMPANY AND TWO RAILROAD COMPANIES,** whereby the land company sells and conveys land to the latter, for the purpose of building and

using thereon their depots, machine-shops, and tracks, and one of the railroad companies surrenders its right to a certain crossing previously selected, to cross elsewhere in a manner beneficial to the other company, and detrimental to itself, is supported by sufficient legal consideration. *Alabama G. S. R. R. Co. v. South & N. R. R. Co.*, 401.

8. **UNCERTAINTY IN.** — WHERE CONTRACT BETWEEN TWO RAILROAD COMPANIES provides that one company shall have the free use of the right of way of the other company, "in a manner to be hereafter determined by deed," but no deed is ever executed, the uncertainty of the contract, if objectionable, is to be deemed waived by the conduct of the parties, the one being placed in possession of the right of way, and the other acquiescing therein without objection for over nine consecutive years. This is an identification of the thing contracted for, so far as qualified by its mode of use, not by declarations, but by the acts of the parties, which can be proved by parol evidence. *Id.*
9. **CONTRACT VOID AS AGAINST PUBLIC POLICY.** — Contract by patentee, not to "manufacture, sell, or cause to be sold any sand-papering machines of any description," is general and unrestricted, and where not limited or qualified by time, place, or circumstance, is unreasonable and void as against public policy; for though it affects only a single class of machines, still it is not incidental to the sale of the patent, nor necessary as a lawful protection of manufacturing or selling thereinunder. *Berlin M. Works v. Parry*, 236.
10. **CONTRACT BY PATENTEE** not to "manufacture, sell, or cause to be sold any sand-papering machines of any description," is general and unrestricted, and not limited to the state where the contract is made. *Id.*
11. **COURTS OF EQUITY CANCEL CONTRACTS FOR FALSE REPRESENTATIONS OF MATERIAL FACTS** which constitute an inducement to the contract, and upon which the party had a right to rely, especially where such representations are of matters peculiarly within the knowledge of the party who makes them. *Rorer Iron Co. v. Trout*, 285.
12. **MATTER OF OPINION MAY AMOUNT TO AFFIRMATION, AND BE INDUCEMENT** to a contract, especially where the parties are not dealing on equal terms, and one of them has, or is presumed to have, means of information not equally open to the other. *Id.*
13. **REPRESENTATIONS ARE NOT OF SUCH MATTERS OF OPINION AS GO FOR NOTHING**, though untrue, where they are made by parties who go to the owners of a mine, and, to induce them to execute a lease thereof, represent that they have the means at hand for successfully working a force capable of mining and transporting a very large quantity of ore daily, and promise to commence operations in sixty days. *Id.*
14. **CONFLICTING EVIDENCE.** — WHERE TESTIMONY IS CONFLICTING AS TO THE CONTRACT PRICE AGREED UPON at oral sale, evidence is admissible to show the value of the property at the time of the sale, as tending to show the real contract. *Valley L. Co. v. Smith*, 216.
15. **WHERE TESTIMONY IS CONFLICTING** as to the contract price, and as to whether defendant objected to an account presented, it is error to suppress defendant's evidence and charge that where no objection is made to an account rendered, it is *prima facie* evidence of its correctness. *Id.*
16. **WHERE EVIDENCE IS CONFLICTING AS TO CONTRACT PRICE**, and defendant introduces in evidence a memorandum of the contract which he testifies he made at the time of its execution in a book kept for that purpose,

and such evidence is unimpeached, it is error to cast doubt and suspicion upon the evidence, and to call the special attention of the jury to the criticisms of counsel upon the memorandum. *Id.*

See COUNTERCLAIM: MARRIED WOMEN, 1-3; SPECIFIC PERFORMANCE.

CORPORATIONS.

1. CHARTERS OF CORPORATIONS ARE TO BE CONSTRUED STRICTLY against the corporators, and what is not unequivocally granted in clear terms, or necessarily implied, must be taken to be withheld. *Mobile v. Railroad Co.*, 342.
2. ULTRA VIRES, PLEADING. — IN ACTION AGAINST CORPORATION TO RECOVER FOR INJURIES CAUSED BY NEGLIGENCE of alleged employees of the corporation, it must appear from the petition that the defendant had authority to enter into a contract of employment; otherwise it will be presumed that there is nothing in the articles of incorporation which either by express provision or by implication authorized the officers of the society to hire such servants, and therefore there can be no recovery against the corporation. *Bashe v. Decatur Co.*, 651.
3. EVIDENCE. — IN ACTION AGAINST CORPORATION FOR MALICIOUS TRESPASS, declarations made by a servant of the defendant indicating his own reckless indifference to consequences regarding the trespass are inadmissible in evidence. But other declarations of such servant in regard to the trespass complained of, made before its completion, and concerning a matter within the scope of his authority, are admissible, as tending to show the *animus* of the defendant. *International etc. R. R. Co. v. Telephone Co.*, 45.
4. CERTIFICATES. — TO CONSTITUTE STOCKHOLDER, SOME SORT OF SUBSCRIPTION OR CONTRACT IS REQUIRED, whereby the subscriber obtains the right, upon some condition, to demand stock and to exercise the rights of a stockholder. But it is not essential that a certificate should have issued in order to create the relation of stockholder, provided a contract to take stock had been duly made, or provided the rights, privileges, and emoluments of a stockholder had been enjoyed, with the consent of the corporation. *Butler's University v. Schoonover*, 627.
5. BOND TO A CORPORATION IS NUDUM PACTUM which assumes that the obligor had subscribed for the corporation's stock, and that the subscription price, which he had retained as a loan, and for which the bond was given, was the consideration of his contract to pay, when it appears that he had never subscribed for nor received any stock, and that he had not in any other manner acquired any right to be recognized as stockholder, and had never acted as such. *Id.*
6. OBLIGOR IS NOT ESTOPPED FROM DENYING THAT HE IS A STOCKHOLDER BY RECITAL IN A BOND that he "has retained of his subscription . . . the sum of . . . being the amount of his subscription, as a loan," although this recital might be evidence that a subscription of some kind had been made. *Id.*
7. WHETHER ONE BECOMES A STOCKHOLDER BY MERELY MAKING A SUBSCRIPTION for stock in a corporation depends upon the terms of his contract and the charter of the corporation, and whether the subscription was made as preliminary to the organization or after it was under way, for stock thereafter to be issued. *Id.*
8. FOREIGN CORPORATIONS ARE ENTITLED TO THE PROTECTION OF STATE LAWS as fully as citizens, if permitted to do business in the state; and

if the statutes of a state permit foreign corporations to do business therein, but impose on them conditions which could not be imposed on citizens, the permit is valid while the condition is void. *San Francisco v. Liverpool etc. Ins. Co.*, 425.

9. FOREIGN CORPORATION DOES NOT WAIVE THE UNCONSTITUTIONALITY OF A STATUTE BY CONTINUING AFTER ITS PASSAGE to do business in the state. If the conditions imposed by the statute are void, no implied assent thereto can be presumed. *Id.*

See BUILDING AND LOAN ASSOCIATIONS; RECEIVERS, 1; TAXATION.

CO-TENANCY.

TENANT IN COMMON MAY COMPEL CONTRIBUTION FROM CO-TENANTS FOR THEIR SHARE OF TAXES rightfully paid by him upon an entire tract of land which had descended to all as heirs. *Eads v. Retherford*, 611.

COUNTERCLAIM.

1. If COUNTERCLAIM STATES FACTS which would constitute an affirmative cause of action but it is indefinite and uncertain as to the amount of damages sustained, its defects should be taken advantage of by motion that it be made more definite and certain, and not by demurrer. *Schweickhart v. Stuewe*, 190.
2. IN ACTION ON CONTRACT for furnishing building-stone, a counterclaim for damages for delay in furnishing the material, which states that defendant was ready and willing to receive the same, and otherwise states a good affirmative cause of action, need not aver that he was ready to pay for the stone, as his contract is sufficient as to his liability and plaintiff's payment on delivery. *Id.*
3. IN ACTION ON CONTRACT to furnish building-stone, defendant may counterclaim for damages for delay in delivering and failure to deliver a part of such stone, though he received that delivered without objection, and used it so that it could not be returned. *Id.*

See MARRIAGE AND DIVORCE.

COVENANTS.

1. RAILROAD — WHO MAY BRING ACTION FOR BREACH OF COVENANT AS TO WATERCOURSE. — Where railroad company erects as a permanent structure upon land, of which it holds only the right of way, a culvert which diverts a watercourse, in breach of a covenant running with the land, the damages are original. The right of recovery therefor arises at once, and accrues in favor of the one who owned the premises at the time; and a conveyance of the fee after such breach does not operate as an assignment of the right of action to the grantee. *Peden v. Chicago etc. R'y Co.*, 680.
2. PAROL EVIDENCE OF WARRANTY OUTSIDE OF DEED. — Damages accruing from breach of warranty of the quality of land conveyed by deed may be proved by parol, to defeat an action on a note for a portion of the purchase price, and this, though the deed contains only the ordinary and usual covenants, and the covenant as to quality is not in writing. *Green v. Batson*, 194.

See DEEDS, 4.

CRIMINAL LAW.

1. **NONAGE — BURDEN OF PROOF.** — Where nonage of defendant is established at the time the crime was committed, the prosecution, in order to convict, must prove that at the time defendant committed the crime he understood the nature and illegality of the act. Proof that he knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age, does not fill the requirements of the law. It must be shown that he had sufficient discretion to understand the nature and illegality of the act constituting the crime. *Carr v. State*, 905.
2. **PROOF OF AGE OF DISCRETION** between good and evil need not be made by direct and positive evidence. Circumstances of education, habits of life, general character, moral and religious instructions, and often facts connected with the crime charged, will be sufficient to satisfy the jury that the defendant had the discretion required to render him responsible for the crime. *Id.*
3. **OPINION AS EVIDENCE** of age of discretion between good and evil. Witnesses, after they have stated the facts upon which their opinions are based, may state their opinions as to whether the defendant, at the time he committed the crime, had sufficient discretion to understand the nature and illegality of the acts constituting it; but the weight to be given to the opinions is for the jury to consider and determine. *Id.*
4. **CONFESSION AS EVIDENCE.** — Confession not made under the influence of fear, or of any positive promise of benefit to be gained, and under caution that it could be used against him, is admissible in evidence against defendant. *Id.*
5. **CONTRADICTION OF CONFESSION — CREDIBILITY OF EVIDENCE.** — Where the confession states that in committing burglary defendant acted under the compulsion of another party, and is contradicted by the party himself, the jury must determine the credibility and weight of the evidence, and in doing so they may believe one portion of the confession, and reject as untrue another portion contradicted by evidence produced. *Id.*
6. **CONFESSION AS EVIDENCE — INSTRUCTIONS.** — Where defendant has confessed that he entered a house with intent to steal therefrom, conviction is not sought, or wholly founded on circumstantial evidence, and it is not necessary to instruct as to circumstantial evidence. *Id.*
7. **JUDGMENT WILL NOT BE REVERSED** where the evidence of guilt, though not entirely free from doubt, is still legally sufficient to support the judgment of conviction. *Id.*
8. **ERRONEOUS CHARGE — WEIGHT OF EVIDENCE.** — Court cannot instruct as to amount or degree of evidence sufficient to warrant conviction. To do so is to charge upon the weight of evidence, and erroneous. Therefore, to charge that if a person is found in possession of property recently stolen, and if the circumstances are such as call upon him for an explanation, and he fails to explain the possession, then these facts would authorize his conviction, if a presumption of guilt has arisen in the minds of the jury from such facts, is error. *Stockman v. State*, 894.
9. **ACCESSARY** is one who, knowing that an offense has been committed, conceals the offender, or gives him any other aid in order that he may evade arrest or trial, or the execution of sentence. But no person who aids an offender in making or preparing a defense, or procures him to be bailed, though he afterwards escape, is an accessory under the Penal Code of Texas. *Blakely v. State*, 912.

10. TO CONSTITUTE ONE ACCESSARY, he need only aid the criminal to escape arrest and prosecution; it is not necessary that he aid him to effect his personal escape or concealment. *Id.*
11. ONE MAKES HIMSELF ACCESSARY to murder, who immediately after the homicide held a private conversation with the murderer, after which the latter departed, and the accessary told the only witnesses present that they must swear to a certain fabricated state of facts at the inquest, so as to make it appear that the killing was justifiable in self-defense, and so that the murderer would be exonerated entirely, or put upon a very light bond to answer the charge. *Id.*
12. WHETHER ONE IS ACCESSARY after the fact depends on whether what he did was personal help to his principal to elude punishment; the kind of help is unimportant; and if any assistance is given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, it is sufficient. *Id.*
13. ACCOMPLICE CANNOT BE CONVICTED upon the testimony of an accomplice, unless corroborated by other evidence tending to connect defendant with the crime committed, and it is not sufficient if it merely shows the commission of the crime. *Id.*
14. CONVICTION CANNOT BE HAD upon the uncorroborated evidence of two or more accomplices, and one accomplice cannot corroborate himself, nor can the evidence of one accomplice corroborate that of another. *Id.*
15. ACCOMPLICE. — WHERE WITNESS IMPLICATES himself in crime by agreeing to and swearing falsely concerning its commission, no matter what his motive, and his claim that he was coerced is immaterial, he is an accomplice, or *particeps criminis*. *Id.*
16. TESTIMONY OF ACCOMPLICE, to be sufficient to convict, must be corroborated, not merely so as to show that the crime charged was committed, but must also show defendant's complicity therein; and where the original taking is the material part of the case, the accomplice must be corroborated on that particular point. *Id.*
17. EACH CONSPIRATOR IS RESPONSIBLE FOR EVERYTHING DONE by his confederates which follows incidentally in the execution of the common design, as one of its natural and probable consequences, even though it was not intended as a part of the original design or common plan. If the act is the ordinary and probable effect of the wrongful act specifically agreed upon, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of and foreign to the common design, all are conspirators. *Bowers v. State*, 901.
18. CONSPIRACY. — JURY MUST DETERMINE whether the act done by a member of a conspiracy naturally flowed from and was done in furtherance of the common design, so as to make him guilty as a participator in the conspiracy. *Id.*
19. BURGLARY — FORMER CONVICTION NOT A BAR. — Where a party is convicted of burglary as a principal, he is still liable to a prosecution for conspiracy to commit the same burglary, and the conviction for the burglary will not bar the prosecution for the conspiracy under the Texas statute declaring that conspiracy is complete if two or more persons positively agree between themselves to commit burglary, though the burglary is not committed. *Whitford v. State*, 896.
20. INDICTMENT CHARGING THEFT of the property of a corporation must describe the corporation by its corporate name in full, and must also allege that it is incorporated. *White v. State*, 879.

21. POSSESSION OF RECENTLY STOLEN PROPERTY UNEXPLAINED is *prima facie* evidence of theft, authorizing a presumption of guilt; but such presumption is not a legal one, but is one of fact, to be found by the jury. The court should not charge the conclusiveness of such presumption, but should submit the facts to be found by the jury. *Stockman v. State*, 894.
22. RECENT POSSESSION OF STOLEN PROPERTY is not positive evidence of theft; it is only a circumstance tending to establish it; and where the case depends upon recent possession, it is one of circumstantial evidence, and the law presenting that character of case must be submitted to the jury. To omit to do so is error; for whilst, under certain conditions, recent possession will support a conviction for theft, it is, in connection with the other conditions, only one of the circumstances from which guilt is inferred. *Boyd v. State*, 908.
23. POSSESSION OF PROPERTY RECENTLY STOLEN — PRESUMPTION — QUESTION FOR JURY. — When party, in whose exclusive possession property recently stolen is found, fails reasonably to account for his possession when called upon, or when the facts are such as to require of him an explanation, the presumption of guilt arising from the recent loss and possession will warrant conviction without further proof. But in such case, the jury must be explicitly instructed that, unless they find that such possession was recent, they will indulge no presumption of guilt because of the fact that defendant was found with such property in his possession. *Id.*
24. INSTRUCTIONS. — TO CONVICT OF THEFT, it must be shown that defendant had some connection with or complicity in the original taking of the property. Proof that subsequently and without complicity, but with knowledge that the property was stolen, he aided the taker to dispose of it, will not warrant conviction; hence the jury should be instructed that, in order to convict, they must believe, beyond a reasonable doubt, that defendant is guilty of the original fraudulent taking; and any subsequent connection, either in good or bad faith, with the property after the taking, would not constitute theft. *Id.*
25. TO CONSTITUTE THE CRIME OF MAIMING, the act must be done both willfully and maliciously. *Bowers v. State*, 901.
26. WILLFUL ACT IS ONE COMMITTED with an evil intent, with legal malice, without reasonable ground for believing the act to be awful, and without legal justification. *Id.*
27. MALICIOUS ACT IS ONE committed in a state of mind which shows a heart regardless of social duty, and fatally bent on mischief; a wrongful act intentionally done, without legal justification or excuse. *Id.*
28. IN TRIALS FOR MAIMING, the court, in instructing the jury, must explain the legal meaning of the words "willfully" and "maliciously." *Id.*
29. IN TRIAL FOR MAIMING, evidence which tends to show that the violent injury inflicted was not committed with a "willful and malicious" intent, within the legal meaning of such words, is admissible, and to reject it is material error. *Id.*
30. MAIMING A QUESTION FOR JURY. — Biting off a portion of the member of a man's body is not necessarily maiming; and the jury must determine whether the member was so injured as to substantially deprive the injured party of it, and constitute the crime. *Id.*
31. EVIDENCE OF BAD CHARACTER OF DECEASED FOR TURBULENCE AND VIOLENCE is not admissible in favor of the accused in case of homicide,

- unless the conduct of the deceased at the time of the killing was such as to create in the mind of the accused a reasonable apprehension of great bodily harm. The purpose of such evidence is to show the honesty of the accused's belief of imminent peril. *Lang v. State*, 324.
32. CONFESSIONS. — CREDIBILITY OF WITNESSES WHO MAY PROVE CONFESSIONS, and the credibility of the confessions themselves, are legitimate subjects of inquiry, and may be impeached in any authorized mode. *Id.*
 33. THOUGH DEFENDANT MAY HAVE CONFESSED OFFENSE CHARGED, YET HE MAY SHOW that it was not in fact committed, or that he was not the guilty agent. But evidence tending to disprove admissions of incidental and collateral facts, though made by him at the same time, is not admissible to impeach witnesses who testified thereto. *Id.*
 34. MURDER IN FIRST DEGREE. — ALABAMA STATUTE, CODE OF 1886, SECTION 3725, DECLARES that "every homicide perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing," is murder in the first degree. And a charge defining the highest degree of murder in these words: "If the defendant, in this county, before the finding of this indictment, purposely killed the deceased by striking him with a base-ball bat, after reflection, with a wickedness or depravity of heart toward the deceased, and the killing was determined on beforehand, even a moment before the fatal blow was struck, the defendant is guilty of murder in the first degree,"—contains all the elements of murder in the first degree within the statutory definition. *Id.*
 35. WORDS "WILLFUL, DELIBERATE, MALICIOUS, AND PREMEDITATED," USED in the statutory definition of murder in the first degree, may all be grouped under the phrase "formed design." *Id.*
 36. ARGUMENTATIVE CHARGE. — ALTHOUGH CHARGE IN REFERENCE TO REASONABLE DOUBT MAY BE OBNOXIOUS TO CRITICISM as being involved and argumentative, yet, if it asserts correct legal propositions, neither the giving nor the refusal of it is an error which will work a reversal of judgment. *Id.*
 37. PLEADING AND PRACTICE — CORRECTION OF RECORD. — IN QUOTING THE CHARGE the court inserted the word "heart" where "heat" occurs in the record, regarding and treating it as a mere clerical mistake in copying, which the charge itself corrects.
 38. MURDER — DECLARATIONS AS PART OF RES GESTÆ. — Declarations or acts of defendant in his own favor, unless part of the *res gestæ* or of a confession, are not admissible for the defense; hence defendant cannot prove his own statements or declarations with regard to the homicide, made within fifteen or twenty minutes after the killing, and after he had gone some twelve hundred yards from the place of the killing. *Lynch v. State*, 888.
 39. CHARGE IS RADICALLY AND FATALLY ERRONEOUS where there is a total want of evidence to support the phase of case to which the charge is applied, or where it assumes a theory not raised or indicated by the evidence. *Id.*
 40. CORRECT INSTRUCTION — CONSTRUCTION OF STATUTE. — It is not error to qualify the word "intention" by inserting before it the word "immediate" when charging the jury under section 608 of the Penal Code of Texas, which declares that threats afford no justification for homicide, "unless it be shown that, at the time of the homicide, the person killed, by some act then done, manifested an 'intention' to execute the threat so

made," as a proper construction of the statute is, that the act done by deceased manifesting his intention to execute his threats must be such as shows an "immediate" intention. *Id.*

41. Self-defense is fairly raised by the evidence, and should be submitted to the jury, where it clearly appears that deceased, for some time previous to the homicide, had been at enmity with defendant; had repeatedly, and apparently without reasonable or probable cause, charged defendant with felony; had threatened to take his life; had actually conspired, and was conspiring at the time of the homicide, to kill him, at which time the deceased met defendant and again accused him of felony, was asked to retract, when he turned towards defendant, and placed his hand to his right side as if to draw a pistol, and where his pistol was afterwards found, when defendant shot and killed him. *Tillery v. State*, 882.
42. SELF-DEFENSE. — IT IS ERROR, when charging the jury, to make the right of self-defense hinge on the fact as to whether defendant "honestly" believed, at the time he acted, that he was in danger of losing his life. The correct rule is, that if it "reasonably" appeared to him, from his standpoint, and from the circumstances, that danger existed, and he acted under such reasonable belief, he was justified in defending, to the same extent, and under the same rules permitted, in case the danger had been real. *Id.*
43. SELF-DEFENSE — ERRONEOUS INSTRUCTION. — When court is instructing in relation to self-defense, and the claim of self-defense is partly based on threats made by deceased against defendant, the charge relating to the whole matter should be given in a connected manner; to disconnect one portion from the other is error. *Id.*
44. LAW OF SELF-DEFENSE, when invoked by proof, should be given to the jury plainly, directly, connectedly, and affirmatively, and in such manner as to show its applicability to the facts in evidence. *Id.*
45. OPINION EVIDENCE. — Witness must state facts within his knowledge, and cannot state his conclusions. So held in a murder case, where the witness was asked if, from an investigation made by him about a charge of arson, he had found any evidence tending to connect defendant with it. *Id.*
46. DECLARATION OF CO-CONSPIRATOR with deceased in seeking to kill defendant, made some time after the homicide, is not part of the *res gestæ*, and therefore inadmissible. *Id.*
47. ESSENTIAL CONSTITUENT OF CRIME OF RAPE is, that the act should be intended to be done with force, actual or constructive, and without the woman's consent, express or implied. If she was at the time unconscious, or in a state of stupefaction, the idea of force is necessarily involved in the wrongful act itself, — the act of penetration. If she is idiotic or *non compos*, she is regarded as incapable of giving consent; but the mere fact that she is weak-minded does not disable her from consenting to the act. *McQuirk v. State*, 381.
48. WHERE, ON TRIAL FOR RAPE, EVIDENCE TENDS TO SHOW THAT PROSECUTRIX WAS WEAK-MINDED, but not that she was idiotic, or so *non compos* as to be incapable of consenting, it is error to refuse to charge that "if the jury have a reasonable doubt that the defendant did the act with or without the consent of the prosecutrix, although they may believe there was force used, and she was a woman of weak mind, they must acquit the defendant." *Id.*

49. SINCE CONSENT GIVEN BY WOMAN MAY BE IMPLIED as well as express, a charge that "if the jury believe from the evidence that the conduct of the prosecutrix was such toward defendant at the time of the alleged rape as to create in the mind of the defendant the honest and reasonable belief that she had consented, or was willing for defendant to have connection with her, they must acquit the defendant," is proper, and to refuse it is error. *Id.*
50. ON TRIAL FOR RAPE, CHARACTER OF PROSECUTRIX FOR CHASTITY, or the want of it, is competent evidence as bearing on the probability of her consent to the defendant's act. But the impeachment of her character in this respect must be confined to general evidence of her reputation, except that she may be interrogated as to her previous intercourse with the defendant. *Id.*
51. TO RENDER ONE GUILTY OF ASSAULT WITH INTENT TO COMMIT RAPE, THERE MUST BE EVIDENCE of an intent to use whatever amount of force was necessary to overcome resistance and accomplish the purpose. It is not enough that defendant desired to have sexual intercourse with the prosecutrix, and that he committed a technical assault upon her person while urging his solicitations. *State v. Kendall*, 679.

See INJUNCTIONS, 4-6.

DAMAGES.

1. EXEMPLARY DAMAGES ARE RECOVERABLE, IN PROPER CASE, ALTHOUGH NOT SPECIALLY CLAIMED, in the complaint in an action against a railroad company seeking the recovery of damages for personal injuries. But if the injuries resulted from simple negligence only, as contradistinguished from gross negligence, exemplary damages cannot be recovered. *Alabama G. R. R. Co. v. Arnold*, 354.
2. EXEMPLARY DAMAGES, WHEN ALLOWED, SHOULD BE PROPORTIONED to the actual damages sustained; and ten thousand dollars exemplary damages, when the actual damages found by the jury were but two hundred dollars, is clearly excessive, and should be set aside. Such disproportion manifests that the jury were influenced by passion, prejudice, or partiality. *Int. etc. R. R. Co. v. Telephone Co.*, 45.
3. ALTHOUGH SENSE OF WRONG OR INSULT MAY NOT CONSTITUTE LEGAL BASIS FOR EXEMPLARY DAMAGES in an action by a corporation for a malicious and oppressive trespass committed upon its property, yet when the result of such trespass is to impair the credit of the corporation and subject it to the expense of litigation, for these injuries it is entitled to claim such damage. *Id.*

See EMINENT DOMAIN; INJUNCTIONS, 8; LANDLORD AND TENANT, 2.

DEEDS.

1. DEED IS DELIVERED to grantee where grantor leaves it with third party with instructions not to record it till after grantor's death, but with the manifest intent that it should take effect immediately. The third party in that case is only made custodian for the purpose of keeping the deed from record. *Hinson v. Bailey*, 700.
2. WHETHER PROVISION IN DEED IS CONDITION SUBSEQUENT OR A COVENANT depends upon intent of parties, and such provision will, if there is any reasonable doubt as to what was intended, be held to be the latter. *Peden v. Chicago etc. R. R. Co.*, 680.

3. **CONDITIONS SUBSEQUENT ARE NOT FAVORED IN LAW, AND ARE ALWAYS STRICTLY CONSTRUED**, since they tend to destroy estates. Therefore a deed to a railroad company of a right of way, which contains, as a part of the consideration, the provision that "the water . . . be made to run" in a certain place, will be construed to be a covenant attached to the land. *Id.*
4. **GRANTOR WHEN ESTOPPED BY DEED WITHOUT COVENANT OF WARRANTY.** — Where a deed recites or affirms, expressly or impliedly, that the grantor is seised of a particular estate which the deed purports to convey, and upon the faith of which the bargain was made, he will be thereafter estopped to deny that such an estate was passed to his vendee, although the deed contains no covenant of warranty at all. And such grantor is therefore estopped from setting up an after-acquired title to the estate thereby conveyed. *Reynolds v. Cook*, 317.
5. **TO JUSTIFY ADMISSION OF SECONDARY EVIDENCE OF DEED**, it is not necessary to prove its loss beyond all possibility of mistake. A reasonable probability of its loss is sufficient; and this may be shown by a *bona fide* and diligent search, fruitlessly made for it in places where it was likely to be found. *Woods v. Montevallo Co.*, 393.

See **CONTRACTS, 4: COVENANTS; REGISTRATION.**

DIVORCE.

See **MARRIAGE AND DIVORCE.**

EASEMENTS.

1. **TO ACQUIRE A PRESCRIPTIVE RIGHT TO AN EASEMENT, IT MUST HAVE BEEN CONTINUOUSLY USED AND ENJOYED** during the whole time prescribed by the statute of limitations. *Totel v. Bonnefoy*, 570.
2. **USE AND ENJOYMENT OF TWO EASEMENTS OF LIKE CHARACTER AND IN NEARLY THE SAME LOCALITY FOR MORE THAN TWENTY YEARS** does not create an easement by prescription if neither was enjoyed for the period of twenty years; so held where a party maintained a drain for sixteen years, and then constructed another drain for the same purpose, but about twenty feet distant from the first, which latter drain was maintained for more than four years. *Id.*
3. **EASEMENT FOR FLOW OF WATER.** — **IF TWO TRACTS OF LAND ADJOIN**, the owner of the upper has a natural easement to have the water which falls on his land flow off upon the tract below. *Id.*

See **HOMESTEADS, 5, 6; MINES AND MINING.**

EJECTMENT.

1. **EJECTMENT FOR INCORPOREAL HEREDITAMENT.** — The grant of a right to quarry and remove limestone from land for a specific purpose passes an incorporeal hereditament to the grantee. Such right is an interest in or a right arising out of land, and as such constitutes a foundation for an action of ejectment under the Virginia code. *Reynolds v. Cook*, 317.
2. **EJECTMENT MAY, BY THE STATUTE OF WISCONSIN, BE BROUGHT AGAINST THE CLAIMANT** of the title, if there is no actual occupant of the premises sought to be recovered. *Burchard v. Roberts*, 148.
3. **EQUITABLE TITLE AVAILS NOTHING IN ACTION OF EJECTMENT** apart from the operation of the statute of limitations. *Woods v. Montevallo etc. Co.*, 393.
4. **INSTRUMENTS THAT ARE MUNIMENTS OF TITLE ARE, AS SUCH, COMPETENT EVIDENCE** in an action of ejectment. *Reynolds v. Cook*, 317.

5. **IN EJECTMENT, PLEA OF NOT GUILTY IS ONLY PLEA ADMISSIBLE IN BAR** of the action, in whole or in part; and a paper called a "disclaimer," but in fact a plea in the nature of a special plea in bar, should therefore be rejected. *Id.*
6. **VERDICT CONTRARY TO EVIDENCE IN EJECTMENT.** — Where the declaration in ejectment charges that the defendant unlawfully withholds possession of a tract of land, but the evidence shows that he asserts no other right or interest in the land, or to the possession thereof, than the right to quarry and remove therefrom limestone for a specific purpose, a verdict finding the defendant not guilty is contrary to evidence, and a new trial should be granted on that ground. The verdict, in such case, should be for the plaintiff, except as to the right to quarry and remove limestone. *Id.*

See EVIDENCE, 5.

ELECTION.

See WILLS, 5.

EMINENT DOMAIN.

1. **DAMAGES ARE RECOVERABLE BY A LAND-OWNER AGAINST A RAILWAY COMPANY FOR MAINTAINING AN INSUFFICIENT CULVERT** in an embankment, whereby his lands are flooded, although damages may have been recovered by plaintiff or his grantor for the location of the road, because the damages then recoverable were to be estimated upon the theory that the road would be constructed and maintained in a reasonably proper and skillful manner. *Ohio & M. R'y Co. v. Wachter*, 532.
2. **DAMAGES RECOVERABLE IN EMINENT DOMAIN PROCEEDINGS TO ACQUIRE A RIGHT OF WAY FOR A RAILWAY** are such as may result from building and operating the road in a reasonably proper and skillful manner, so as to avoid the infliction of all loss and injury not necessarily resulting from thus building and operating the road. Hence, if the road is not so built or operated, the owner of the land at the time of any injury accruing from the want of proper skill and care may recover therefor. *Id.*
3. **ESTOPPEL.** — **PERSON IS NOT ESTOPPED TO CLAIM COMPENSATION FOR RIGHT OF WAY** by permitting a railroad company to construct its road over his land, and operate it without interference. *Thornton v. Sheffield & B. R. R. Co.*, 337.
4. **EVIDENCE — OPINION OF WITNESSES AS TO VALUE OF LOTS CONDEMNED FOR RAILROAD COMPANY — INSTRUCTIONS.** — Where property has a market value, the rule is strict, and requires only that value to be shown; but where it is shown that property is without a market value, it may then be compared with other property, and its value determined by persons who are shown to be judges, or who have knowledge of the values of real estate in that vicinity, or who have had experience in dealing, both before and after the appropriation, in lots near by, and an instruction that the jury might, in such case, consider such opinions of witnesses, and upon the whole evidence were to be guided by their observation of the property as shown them, and so determine its fair market or real value, is not erroneous. *St. Louis etc. R'y Co. v. Chapman*, 744.

EQUITY.

1. **EQUITY WILL NOT PERMIT JUST RIGHTS OF PARTY TO BE LOST THROUGH MISTAKE** or ignorance of fact, when such relief is not prejudicial to the rights of others. *Fears v. Albee*, 78.

2. **SUIT TO QUIET TITLE TO REAL PROPERTY OR TO REMOVE A CLOUD THEREFROM** cannot be sustained in Illinois unless plaintiff is in possession thereof, or unless the lands are unimproved and unoccupied; and a bill which does not aver that the complainant is in possession of the property, nor that it is unoccupied, must be dismissed for want of equity. *Wetherell v. Eberle*, 574.
 3. **ALL MATTERS WHICH GO TO THE JURISDICTION OF A COURT OF EQUITY** may be taken advantage of by demurrer, whether specially pointed out or not. This defect may be suggested *ore tenus* on the argument. *Id.*
 4. **WHERE AVERMENT IN COMPLAINT TO QUIET TITLE IS THAT PLAINTIFF OWNS THE FEE** of the land in controversy, but does not specifically set forth his title, the law declares that he owns the entire estate absolutely. *Lane v. Schlemmer*, 621.
- See **CONTRACTS**, 11; **EJECTMENT**, 3; **ESTOPPEL**, 5; **INJUNCTIONS**; **JUDGMENTS**; **JURY AND JURORS**; **MISTAKE**; **TAXATION**; **TRESPASS**; **WILLS**.

ESTATES OF DECEDENTS.

1. **JURISDICTION.** — UPON APPLICATION BY ADMINISTRATOR FOR ORDER TO SELL LANDS OF DECEDENT, whether for the payment of debts or for distribution among heirs, the failure to name one or more of such heirs in the petition, or subsequent proceedings, is not the omission of a jurisdictional allegation, and does not affect the validity of the title acquired at such sale, so as to subject it to collateral attack. In such cases, the parties interested, whether parties to the record or not, may be made so by application to the court so as to sue out an appeal. *Lyons v. Hamner*, 363.
2. **IN THE DISTRIBUTION OF AN ESTATE, PERSONS CLAIMING ADVERSELY** to the decedent cannot present their claims and have property in the hands of the administrator turned over to them, on the ground that it belonged to them and not to decedent. *Estate of Rowland*, 464.
3. **HUSBAND, ON SETTLEMENT AND DISTRIBUTION OF WIFE'S ESTATE**, cannot obtain an order that certain moneys in the hands of the administrator be turned over to him as community property. *Id.*
4. **DISTRIBUTION OF WIFE'S ESTATE CANNOT PREJUDICE HUSBAND'S CLAIM** that property which the decree of distribution purports to distribute was in fact community property, and belonged to him as the survivor of the community, for the court has no jurisdiction over such property in administering the estate of the wife. *Id.*

See **EXECUTORS AND ADMINISTRATORS**; **RECEIVERS**, 2.

ESTOPPEL.

1. **ESSENTIAL ELEMENTS OF ESTOPPEL ARE**, — 1. A false representation or concealment of material facts; 2. The representation must have been made with a knowledge of the facts; 3. The party to whom it was made must have been ignorant of the truth of the matter; 4. It must have been made with the intention that the other party should act upon it; and 5. The other party must have been induced to act on it. *Bynum v. Preston*, 49.
2. **ESTOPPEL IN PARS IS ONE THAT ARISES FROM ACTS, CONDUCT, OR DECLARATIONS** of a person, by which he designedly induces another to alter his position injuriously to himself. But an agreement relied on as an estoppel must be executed, and not merely executory. *Rorer I. Co. v. Trout*, 285.

3. **ESTOPPEL MAY BE CREATED NOT ONLY WHEN PARTY SOUGHT TO BE CONCLUDED KNOWS** the material facts he is charged with having represented or concealed, but also when he is in such position that he ought to have known them, so that knowledge will be imputed to him. *Weinstein v. Nat. Bank*, 23.
 4. **WHEN ONE PARTY HAS BEEN PREVENTED, BY CONDUCT AND REPRESENTATIONS OF ANOTHER**, from taking prompt action for the collection of his debt, this is such a change in his position for the worse as to meet the requirement of the law in creating an estoppel. *Id.*
 5. **IT IS SOUND RULE OF EQUITY, SUPPORTED BY PRINCIPLES OF JUSTICE** as well as of public policy, that if the owner of land knowingly suffers another to purchase and spend money on it, under circumstances inducing an erroneous opinion or mistaken belief of title, without making known his own claim, he will not afterwards be permitted to assert in equity any right or title against the purchaser. *Alabama G. S. R. R. Co. v. South & N. R. R. Co.*, 401.
- See **AGENCY**, 2; **BANKS AND BANKING**, 6, 7; **DEEDS**, 4; **EMINENT DOMAIN**, 3; **MARRIED WOMEN**, 4, 5; **STATUTE OF FRAUDS**.

EVIDENCE.

1. **COURTS WILL TAKE JUDICIAL NOTICE OF FACT** that a township, whether used in the sense of a municipal division of a county or of a township according to government survey, has no subdivisions known as "blocks." That term is applied only to the subdivisions of a platted town, village, or city. *Herrick v. Morrill*, 841.
2. **EVIDENCE, RELEVANCY OF.** — When, on the trial of an action, the issue is whether the apparent purchaser of the property in controversy really purchased it with his own money, any testimony tending directly to show that he had no money of his own, or not enough to have made the purchase, is admissible; and in this connection, it may be shown whether he was engaged in any business at or before the time of the purchase, whether he was frugal or prodigal in his expenditures, and whether he was industrious or indolent in his habits; but evidence that he habitually visited saloons and houses of ill-fame is too remote, and being calculated to prejudice the jury, should be excluded. *Stone v. Day*, 17.
3. **TITLE BOND IS ADMISSIBLE AS EVIDENCE IN ACTION OF EJECTMENT WITHOUT PROOF** of its execution, it having been executed nearly thirty years before the commencement of the action, and coming from the custody of one claiming an interest in the land, unaccompanied by any circumstance casting suspicion on its genuineness. *Woods v. Montevallo Co.*, 393.
4. **RECEIPT OVER TWENTY YEARS OLD, PURPORTING TO BE EXECUTED BY ATTORNEY OF RECORD** for the plaintiff in a judgment, acknowledging the satisfaction of the judgment, is admissible in evidence to show such satisfaction, without proof of its execution. *Id.*
5. **EXISTENCE OF FACT CANNOT BE PROVED BY REPUTATION** or notoriety, but when the fact is otherwise established, its general notoriety may be shown to charge a person in the neighborhood with knowledge of it. *Id.*
6. **TO PROVE WHAT ONE IS WORTH, ANY PERSON HAVING KNOWLEDGE** of his pecuniary affairs may testify. One who managed the settlement of his estate, and in that way acquired knowledge of his

affairs, may testify thereto; and the fact that he acquired this knowledge, in whole or in part, from proceedings had in the probate court in due settlement of the estate, does not make his evidence secondary in its nature. *Phelps v. Winona etc. R. R. Co.*, 867.

7. **DECLARATIONS BY A PARTY IN POSSESSION OF PERSONAL PROPERTY AS TO OWNERSHIP THEREOF**, accompanying some principal fact which they serve to explain and qualify, are sometimes said to be a part of the *res gestæ*, and with the proper limitations and restrictions may, in certain cases, be permitted to go in evidence; but witnesses may not be allowed to state the common understanding in the neighborhood, or the general reputation as to ownership. *Reiley v. Hayes*, 737.
 8. **WHOLE CONVERSATION ADMISSIBLE WHERE PART IS GIVEN IN EVIDENCE.** — Where part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other party. Hence, where the prosecuting witness testifies that he found his stolen property in the possession of a third party, and that, in conversation with such party, the latter consented for witness to take his property, but afterwards refused to let him do so, the witness may be asked, on cross-examination, if, in the same conversation when declining to give up the stolen property, the third party did not claim, as a reason for his action, that he had purchased it. *Stockman v. State*, 894.
 9. **DECLARATIONS AS RES GESTÆ.** — When an act is done to which it is necessary or important to ascribe a character, motive, or object, anything said by the actor at the time from which the character, motive, or cause may be collected is part of the *res gestæ*, and may be given in evidence, whether the actor is or is not a party to the suit. *Id.*
- See **AGENCY**, 10; **ASSUMPSIT**; **CRIMINAL LAW**; **DEEDS**, 5; **EJECTMENT**, 4; **EMINENT DOMAIN**; **HIGHWAYS**; **SLANDER**; **TELEGRAPH**; **WITNESSES**.

EXECUTIONS.

1. **JUDGMENT BEING VOID FOR WANT OF JURISDICTION APPEARING UPON THE FACE OF THE RECORD**, no title can be acquired by a purchaser at a sale under execution issued upon that judgment. *Barber v. Morris*, 836.
2. **SHERIFF'S SALE.** — **CREDITOR'S RIGHT TO ISSUE EXECUTION AGAINST PROPERTY OF JUDGMENT DEBTOR TERMINATES AT DEBTOR'S DEATH**, and in the absence of any order re-establishing that right, a sale and deed of such property under the execution are ineffectual for the enforcement of any right held by the creditor against the debtor. *Boyle v. Maroney*, 657.
3. **EXECUTION SALE—FRAUD INVALIDATING.** — Where the sheriff levies upon property in violation of law, induced thereto by one who becomes the purchaser at the execution sale, at a grossly inadequate price, the sale thus procured is illegal, and, as to such purchaser, may be avoided by the judgment debtor. *Stone v. Day*, 17
4. **PARTIES TO PROCEEDING TO SET ASIDE EXECUTION SALE.** — Where, in proceeding to set aside execution sale procured by fraud of purchaser, no complaint is made as to the validity of either judgment or execution, and there are no equities to adjust between the execution creditors and the original purchaser against whom relief is sought, the plaintiff in execution is not a necessary party, and the proceeding is in no sense collateral in character. *Id.*
5. **EXECUTION SALE—PURCHASE SUBJECT TO EQUITIES.** — Where the owner of a judgment, under which land is sold at execution sale, becomes the

purchaser at such sale, and credits the purchase-money of the land upon his execution, he takes the land charged with all the equities to which it is subject, and acquires no title under the execution sale as against a claimant in possession, who had paid purchase-money and made valuable improvements, under a parol contract; and this is so although the judgment debtor was the apparent owner of the land when the debt was contracted, and when the judgment was rendered. *Barnett v. Vincent*, 98.

See EXEMPTIONS; FRAUDULENT CONVEYANCES, 8• REPLEVIN; WRITS OF ASSISTANCE.

EXECUTORS AND ADMINISTRATORS.

1. ADMINISTRATOR IS CHARGEABLE WITH LOSS OF PROCEEDS OF DRAFT PAYABLE TO HIM as administrator, where he indorses it for collection, and places it in the hands of persons whom he does not know, and does not know to be reliable. *Davis v. Chapman*, 251.
2. ADMINISTRATOR OF CREDITOR OF UNITED STATES MAY RECEIVE PAYMENT ANYWHERE that the government may choose to pay it; and a surety on his bond, wherever given, is accountable, if he collects the claim and fails to account for it, no matter where the payment is made. *Id.*
3. EXECUTOR WHO SELLS PERSONAL PROPERTY OF HIS TESTATOR, WITHOUT AN ORDER OF COURT, is guilty of its conversion, and becomes responsible for its value, with legal interest. *Estate of Radovich*, 466.
4. EXECUTOR WHO HAS RESIGNED HIS TRUST, SETTLED HIS ACCOUNTS, AND RECEIVED HIS DISCHARGE, MAY, NEVERTHELESS, BE CITED before the court by his successor, under section 1629 of the Code of Civil Procedure of California, and required to account for property converted by him and not included in his former accounts. *Id.*
5. EXECUTOR HAS NO RIGHT TO GIVE AWAY STOCKS because he regards them as worthless. *Id.*
6. MEASURE OF EXECUTOR'S LIABILITY FOR STOCKS, WHICH HE HAS PERMITTED TO BE SOLD without an order of court, is not limited to their appraised nor to their actual value, but extends to the amount for which they were sold, where that exceeds the appraised or actual value. *Id.*
7. EXECUTOR WHO SUES TO RECOVER MONEYS PAID BY HIM BY MISTAKE may describe himself as executor in his complaint, though the legal title to the moneys sued for is in him. The descriptive words may be treated as surplusage. *Wolf v. Beaird*, 565.
8. EXECUTOR MAY SUE IN HIS OWN NAME AND RIGHT ON A CONTRACT MADE WITH HIM, or if the word "executor" is used after his name, it will be regarded as merely descriptive of his person, and as immaterial. *Id.*
9. CLAIM FILED BY A AS EXECUTOR OF B AGAINST THE ESTATE OF C, FOR MONEYS PAID TO C THROUGH A MISTAKE OF FACT in supposing that B's estate was solvent, should be allowed, although at the time of filing the claim it may not be certain whether the moneys are due to A, as executor or in his private capacity, or to the creditors of B. *Id.*

See ESTATES OF DECEDENTS, 1; MISTAKE, 5.

EXEMPTIONS.

1. Terms "all household and kitchen furniture" may include a piano kept and used for the purpose of instructing the children of the family in music, if the statute places no limit on the value of the household and kitchen furniture which it declares shall be exempt. *Alsop v. Jordan*, 53.

2. **WHETHER EXEMPTIONS FROM FORCED SALE EXTEND FURTHER THAN THEY OUGHT** is for the consideration of the legislature, it being the plain duty of the courts to enforce the legislative intent, as manifested by the letter and spirit of the statute. *Id.*
3. **ORDINARY OFFICE FURNITURE OF A LAWYER IS EXEMPT FROM EXECUTION**, and is covered by section 3072 of the Iowa Code, which provides that the proper tools, instruments, etc., of a lawyer shall be exempt, and where a landlord's attachment is issued and levied upon such furniture it should be discharged on motion. *Abraham v. Davenport*, 665.

See FRAUDULENT CONVEYANCES, 8.

FORGERY.

See AGENCY, 6-9; BANKS AND BANKING, 4, 5.

FRANCHISES.

GRANT, IN ITS OWN NATURE, AMOUNTS TO EXTINGUISHMENT OF RIGHT OF GRANTOR, and implies a contract not to reassert that right, and this principle is applicable to franchises lawfully granted by municipal corporations. *Mobile v. Railroad Co.*, 342.

FRAUDS.

LIABILITY FOR INJURY RESULTING TO THIRD PERSON FROM FRAUDULENT REPRESENTATIONS. — If false and fraudulent misrepresentations are made to one person, with the expectation that they should be communicated to and acted on by a third person, and they are so communicated to and acted on by him to his prejudice, the result of the fraud must be deemed to have been contemplated by the party first making such representations, and he is liable therefor. *Chubbuck v. Cleveland*, 864.

FRAUDULENT CONVEYANCES.

1. **CREDITOR CANNOT IMPEACH AS FRAUDULENT a sale or voluntary disposition of property which by statute is exempt from the payment of debts.** *Nance v. Nance*, 378.
2. **FRAUD CANNOT BE INFERRED FROM MERE FACT** that two conveyances were executed when one would have answered. *Id.*
3. **EVIDENCE.** — Circumstances may show that transaction amounted to a conveyance in fraud of creditors, although such conclusion is against the positive testimony of three witnesses, their stories being unreasonable, inconsistent with each other, and self-contradictory. *Boyle v. Maroney*, 657.
4. **JUNIOR JUDGMENT CREDITOR TAKES PRIORITY OVER THE SENIOR WHEN HE FIRST INSTITUTES PROCEEDINGS** to recover property which the debtor has fraudulently conveyed away. *Id.*
5. **HUSBAND MAY PREFER HIS WIFE OVER OTHER CREDITORS.** He has a clear and undoubted right to pay her a just debt at any time, in money or in property, and land so conveyed to her is free from the claim of any other of his creditors. *Cornell v. Gibson*, 605.
6. **TRUSTEE.** — WHERE HUSBAND EXPENDS MONEY UPON WIFE'S REAL ESTATE TO DEFRAUD HIS CREDITORS, and she knows of such intent and colludes with him to effect that purpose, she occupies the position of a fraudulent grantee, and is a trustee for the creditors, and accountable to them

in equity to the extent of the money so expended, whether it remain in the land, or is afterwards converted by a sale into money which she retains. *Blair v. Smith*, 593.

7. WHERE HUSBAND, WITH INTENT TO DEFRAUD HIS CREDITORS, GIVES HIS WIFE MONEY, which she, with full knowledge of that purpose, accepts and yields no consideration, she holds it as trustee for such creditors, and must account to them for it in equity. *Id.*
8. TRANSFER OF PROPERTY EXEMPT FROM EXECUTION CANNOT BE FRAUDULENT as against creditors. *Id.*

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT.

GIFT.

1. IF ONE DECLINES TO BECOME DONEE OF DEBT by taking the debtor's note payable to her as proposed by the donor, but for the purpose of placing it beyond the reach of her creditors procures the note to be made payable to her minor child, the gift to her was never perfected, and she is estopped from assailing the validity of the transfer to her child. *Thweatt v. McCullough*, 391.

GRANT.

PRACTICAL CONSTRUCTION OF GRANT ESTABLISHED BY YEARS OF UNIFORM USAGE, acquiesced in by the public, and not denied by those adversely interested, is the strongest evidence that the grant has been rightly interpreted. *Mobile v. Railroad Co.*, 342.

GROWING CROPS.

1. GROWING GRASSES ARE A PART OF THE LAND as a general rule, whether such grasses are wild or cultivated, and an agreement in writing is required for their sale and severance from the land. *Smith v. Leighton*, 778.
2. GROWING CROPS PASS TO THE GRANTEE, as between grantor and grantee to a deed of conveyance, where there is no reservation of grass or exception of any kind; and the grantee, as against a tenant of the grantor, has a right to the crops, and to collect all unpaid rents. *Id.*
3. CHATTEL MORTGAGE COVERING "ALL CROPS GROWING AND TO BE GROWN" is not void for uncertainty as to that part which refers to "all crops growing," in that it fails to specify the year in which the crop was to be grown, but is void as to the part which refers to the crops "to be grown." *Luce v. Morehead*, 695.
4. EVIDENCE. — IN ACTION TO ENFORCE LANDLORD'S LIEN against crops alleged to have been converted, certain chattel mortgages upon the crops, held by third persons, which were executed after the crops were planted, and before the conveyance of the land to the plaintiff, are admissible in evidence, when they would, if they were paramount to the lien, defeat a recovery. *Id.*

GUARANTY.

See STATUTE OF FRAUDS, 2.

GUARDIAN AND WARD.

1. **IN ACTION BY GUARDIAN TO RECOVER FUNDS PLACED BY HIM** in the defendant's hands, to be specially applied to the use of the plaintiff's ward, proof that the plaintiff had been sued by another person for the tuition of the ward is, as to the defendant, *res inter alios acta*, or mere hearsay evidence, and inadmissible. *Thweatt v. McCullough*, 391.
2. **LIABILITY OF SURETIES ON GUARDIAN'S BOND — EVIDENCE.** — Sureties on guardian's bond are not responsible for any default which may have occurred before they signed the bond, but the undertaking covers money held by the guardian when the bond was accepted, and the fact that he had received it but six days before that has some tendency to prove that it was in his hands at that time, and is admissible. *Bockenstedt v. Perkins*, 652.
3. **ON APPEAL, FINDING OF COURT WILL NOT BE DISTURBED**, where the action is at law, if there was any evidence which reasonably sustains it; therefore a judgment against sureties on guardian's bond will not be set aside, although the only evidence on which it is based is, that money had been paid the guardian six days prior to the execution of the bond, and that it had not been accounted for. *Id.*

HIGHWAYS.

1. **ESTABLISHED PRESUMPTION OF LAW IS**, that the owner of land abutting on a street owns also the fee in the street. *Rich v. Minneapolis*, 861.
2. **PUBLIC ACQUIRES IN STREET ONLY RIGHT OF WAY**, with the powers and privileges incident thereto; and subject to this right, the soil and mineral belong to the owner of the fee. The public easement justifies only the taking of material which the process of the construction or repair of the street requires. *Id.*
3. **EVIDENCE OF SIMILAR ACCIDENTS.** — In action for injuries sustained by plaintiff from defect in public highway, evidence is inadmissible that at about the same time other accidents, similar to that which resulted in injury to the plaintiff, had happened to other persons from the same defect. *Phillips v. Willow*, 114.
4. **NEGLIGENCE. — EVIDENCE OF OTHER SIMILAR OCCURRENCES ON OTHER OCCASIONS IS NOT ADMISSIBLE** for the purpose of raising a presumption that the particular accident in question happened, or that the place was defective and dangerous, or that the situation was of such a character that the occurrence resulting in the injury complained of might well have taken place. *Cleveland etc. R'y Co. v. Wynant*, 644.
5. **EVIDENCE. — WHETHER ANY PARTICULAR OBJECT IS CALCULATED TO FRIGHTEN HORSES IS NOT TO BE PLEADED AND PROVED**, but is to be determined by the experience, observation, and intelligence of the court and jury as applied to all the facts of the particular case before them. *Id.*
6. **OWNER OF OBJECT OBSTRUCTING HIGHWAY IS NOT NECESSARILY LIABLE FOR DAMAGES** resulting from fright thereby occasioned to horses, merely because such obstruction is in violation of a statute. There must have been a natural causative connection between the violation of the statute and the frightening of the horses to render the owner liable; and the injury must in each case be proximately such as was within the purpose and protection of the statute. *Id.*
7. **NEGLIGENCE — INSTRUCTION. — RAILWAY COMPANY HAS RIGHT TO LEAVE ITS CARS AT ANY POINT ON ITS SIDE-TRACK** except in or upon the high-

way; and where a car was so left, but was afterwards moved upon the highway by persons for whom the company was not responsible, and while there it frightened the plaintiff's horses, and she was injured in consequence, no liability is created against the company, unless it negligently permitted the car to remain upon the highway an unreasonable length of time, and it is error to refuse an instruction to that effect. *Id.*

8. **NEGLIGENCE — EVIDENCE. — IN ACTION FOR DAMAGES RESULTING FROM DEFENDANT'S NEGLIGENCE IN OBSTRUCTING HIGHWAY** crossing with snow thrown from the railroad track, causing the death of the plaintiff's intestate, evidence of the difficulties experienced by other travelers in attempting to make the crossing for some days prior to the accident, and while the highway was in substantially the same condition, is admissible, both to prove the unsafe condition of the highway, and also that this had continued so long as to charge the defendant with knowledge of the fact, and with negligence in not removing the obstruction. Evidence of what the deceased was worth at the time of his death is also admissible, for the purpose of showing the reasonable expectation of pecuniary benefit to his family from the continuance of his life. *PHELPS v. Winona etc. R. R. Co.*, 867.

See MUNICIPAL CORPORATIONS, 10-13.

HOMESTEADS.

1. **HOMESTEAD RIGHT CONSTITUTES A FREEHOLD**, within the meaning of a statute granting a right of appeal in cases where freehold estates are involved. *Snell v. Snell*, 526.
2. **MAN AND WOMAN, LIVING TOGETHER IN ADULTERY, DO NOT CONSTITUTE FAMILY**, within the meaning of the law exempting the homestead from forced sale under execution. But a father, and his illegitimate children living with him, constitute a family such as may assert homestead rights, and such rights cannot be defeated by the fact that the father permitted a woman with whom he unlawfully cohabited to dwell on the land. *Lane v. Phillips*, 41.
3. **A HOMESTEAD DECLARATION, FILED WHILE THE CLAIMANT HAS ANOTHER HOMESTEAD duly selected, and never abandoned, is void.** The fact that the first homestead was sold under execution and surrendered to the purchaser is immaterial, because, such sale being void, the homestead right is in no way affected thereby. *Waggle v. Worthy*, 440.
4. **PARTY CANNOT HAVE TWO HOMESTEADS AT THE SAME TIME;** and if he attempts to acquire a second while the first is in force, the second is void, and subject to judgment liens. *Id.*
5. **CONSENT OF WIFE IS NECESSARY TO VALIDATE GRANT** made by husband to a railroad of right of way over homestead occupied as such by the family. No interest, encumbrance, or lien, except those specifically mentioned in the organic law, can attach to or affect the homestead unless given by the joint consent of husband and wife. *Pilcher v. Atchison etc. R'y Co.*, 770.
6. **EVIDENCE OF WIFE'S CONSENT TO ALIENATION. —** The fact of joint consent of husband and wife to an alienation of an easement in the homestead is best evidenced by a writing to that effect; but where the constitution does not in express terms require that it shall be so shown, it may be established the same as any other material fact, provided that there is always some showing of joint consent, as required by the constitution. *Id.*

7. **HOMESTEAD ENTRY — SUBSEQUENTLY ACQUIRED TITLE INURES TO MORTGAGEE.** — Where a party, with right of pre-emption to lands, mortgages his interest for a valuable consideration, and afterwards enters as tenant of the mortgagee, and while so in possession makes a new homestead entry, commutes the same, proves his occupation, pays the price, and receives title, such subsequently acquired title inures to the benefit of the mortgagee, and becomes a lien upon the land. *Spiess v. Neuberg*, 211.
8. **LIEN UPON LAND ENTERED AS A HOMESTEAD, BUT FOR WHICH THE PATENT HAS NOT BEEN ISSUED,** cannot, under section 2296 of the Revised Statutes of the United States, be acquired, for machinery placed thereon, to secure payment therefor. But where the removal of such machinery will not materially impair the realty, a lien may be claimed on the machinery itself under the Wisconsin statute. *Paige v. Peters*, 156.

HOMICIDE.

See CRIMINAL LAW.

HUSBAND AND WIFE.

1. **ANTENUPTIAL SETTLEMENT BY WHICH HUSBAND CONVEYS** land to the wife, in consideration of the marriage, is not fraudulent and void as to his creditors, although he was at the time insolvent, or may have intended fraud, if the wife had no notice of his fraudulent intent, and did not participate in any such purpose on his part. *Nance v. Nance*, 378.
2. **VALUE OF PERSONAL SKILL AND LABOR EXPENDED BY HUSBAND,** in the improvement of his wife's estate, cannot be reached by a court of equity, and appropriated to the satisfaction of creditors' claims against the husband. *Id.*
3. **MATERIALS FURNISHED BY HUSBAND WITH HIS OWN MONEY, AND USED IN IMPROVING HIS WIFE'S PROPERTY,** if he is embarrassed, will be regarded as a gift in fraud of his creditors, who may make the wife's estate liable therefor. But her estate will not be charged, if the whole amount so expended by him, with his other personal property, is of less value than the amount exempted from execution in his hands. *Id.*

See ESTATES OF DECEDENTS, 2-4; FRAUDULENT CONVEYANCES, 5, 6; HOMESTEADS.

INFANCY.

See CRIMINAL LAW, 1.

INJUNCTIONS.

1. **COURT OF EQUITY HAS JURISDICTION TO ENJOIN ENFORCEMENT OF CITY ORDINANCE,** having for its purpose the destruction of the franchise of a railroad company, in which the public has an interest, where the injury to the company will be irreparable; and the company is not required to establish its right at law before invoking the aid of equity, its right being clear and free from doubt, the validity of the franchise depending upon the construction of a grant from the city, authorized by the company's charter. *Mobile v. Railroad Co.*, 342.
2. **COURT OF EQUITY WILL NOT INTERFERE TO ENJOIN MERE TRESPASS** of ordinary character, either upon the person or property. But where a trespass, or a series of trespasses, operate in effect to destroy or seriously impair the exercise of a franchise, a court of equity will not

hesitate to interpose to prevent the apprehended injury by the aid of injunction. *Id.*

3. COURT OF EQUITY WILL NOT REFUSE TO INTERFERE BY INJUNCTION to restrain a city from unlawfully attempting, by an ordinance, to destroy the valuable franchise of a railroad company merely because the ordinance is of a *quasi* criminal character. *Id.*
4. COURTS OF EQUITY WILL NOT INTERFERE TO RESTRAIN CRIMINAL OR QUASI CRIMINAL PROCEEDINGS, as a general rule, nor take jurisdiction of any case or matter not strictly of a civil nature. *Poyer v. Des Plaines*, 494.
5. EQUITY WILL NOT RESTRAIN ENFORCEMENT IN APPROPRIATE COURTS OF ORDINANCES ENACTED BY PROPER AUTHORITY, on the ground that such ordinances are illegal, or that the person accused of their violation is innocent. Nor will it enjoin proceedings under an ordinance for the purpose of determining its validity in a court of law, when the defendant has an adequate remedy at law. *Id.*
6. EQUITY WILL NOT ENJOIN PROSECUTIONS UNDER A CITY ORDINANCE, TO PREVENT A MULTIPLICITY OF SUITS, unless complainant has first established the invalidity of the ordinance, and his consequent right to protection therefrom by a successful defense in some action at law. *Id.*
7. BILL IN EQUITY CLAIMING COMPENSATION FROM RAILROAD COMPANY FOR RIGHT OF WAY will be made effective by injunction, if necessary, until the damages are properly ascertained, or until the company obtains the right of way in legal form. *Thornton v. Sheffield etc. R. R. Co.*, 337.
8. JURISDICTION TO AWARD DAMAGES ON THE DISSOLUTION OF AN INJUNCTION IS NOT LOST by the expiration of the term at which final judgment was entered directing such dissolution, if the defendants were then granted leave to file suggestion of damages, and the cause was thereafter regularly continued from term to term, until suggestions were filed under the leave granted, and the cause was thereafter further continued from term to term, until the suggestions were heard and considered and the damages assessed. *Poyer v. Des Plaines*, 494.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSURANCE.

1. LIFE INSURANCE COMPANY IS ESTOPPED FROM DENYING AUTHORITY OF ITS AGENT, where it issues a policy of assurance upon an application procured by him, and receives from the assured, up to the time of his decease, all the dues and assessments, payable to the company under the policy. *McArthur v. Home Life Ins. Co.*, 684.
2. FRAUD OF LIFE INSURANCE AGENT BINDS COMPANY, AND HE ACTS WITHIN SCOPE OF HIS AUTHORITY, where, having been duly authorized as agent to fill up application, he fraudulently and falsely misstates material facts therein and in the medical certificate, and also makes material alterations in the policy itself, of which acts neither the assured nor the company have any knowledge. *Id.*
3. HOLDER OF INSURANCE POLICY IS CHARGEABLE WITH KNOWLEDGE OF ITS CONTENTS, in the absence of fraud, misrepresentation, or concealment, when he has an opportunity to examine it before acceptance. *Morrison v. Ins. Co.*, 63.
4. PLEADING IN WHICH PARTY SEEKS TO EXCUSE HIMSELF FROM OBLIGATION to comply with the terms of an insurance policy, on the ground

of ignorance of its contents, but not alleging fraud, misrepresentation, or concealment, is bad on special exception. *Id.*

5. **AGENCY.** — **INSURANCE COMPANY IS CHARGEABLE WITH KNOWLEDGE OF EVERY FACT** of which its general agent has knowledge, and when the company fails promptly to repudiate the acts of such agent, it will be held to have ratified them, or to be estopped by its silence when it ought to have spoken. *Id.*
6. **REINSURANCE.** — **ALTHOUGH POLICY OF INSURANCE PROVIDES** that it shall be null and void unless countersigned by the company's general agent, having power to "issue and cancel policies for it, make renewals and indorsements of other insurance when necessary," and also that the procuring of other insurance on the property, "not made known to this company, and consented to hereon," will avoid the policy, yet if other insurance was obtained, and such agent when informed thereof made no objection, but promised to indorse his consent on the policy, and afterwards made a written memorandum for renewal, with such reinsurance embodied therein, but did not indorse it on the policy, the company will be bound by its acquiescence in such acts of its agent; and this is so, although the policy stipulates that "agents of this company have no authority to bind the company in violation of any of the printed terms or conditions of insurance, as herein expressed; and no printed or written condition or restriction hereof, which by its terms may be subject to waiver, shall be deemed to have been waived, except by a distinct, specific agreement, clearly expressed in the body of the policy." Any condition in the policy which, under its terms, might have been waived in the body thereof, and not otherwise, must be deduced, within the meaning of this stipulation, a condition or restriction "subject to waiver," and to such only does the stipulation apply. *Id.*
7. **CONSTRUCTION OF POLICY — INCREASE OF RISK.** — A policy of fire insurance provided that if the insured buildings should be "altered, added to, or enlarged," due notice must be given and consent indorsed on the policy. A by-law, made part of the contract, provided that whenever a building should be "altered, enlarged, or appropriated to any other purposes than those mentioned, or the risk be otherwise increased," without the consent of the insurer first obtained, the policy should be void. Under these provisions in the policy, notice to the insurer and consent to a material enlargement of the building are required, although the risk be not in fact thereby increased. A written permission in such policy "to make necessary alterations and repairs" does not authorize a material enlargement of the building by an addition twelve feet wide and two hundred feet long. *Frost's D. L. etc. Co. v. Millers' etc. Ins. Co., 846.*
8. **WHILE WRITTEN PROVISION OF CONTRACT SHOULD PREVAIL** over one inconsistent with it, and which is part of a printed form, adopted for general use, yet only so far as it is apparent that the parties intended to modify or disregard the printed stipulations will the latter give way. *Id.*
9. **PAROL EVIDENCE THAT ENLARGEMENT OF BUILDING INSURED WAS CONTEMPLATED** at the time the insurance was effected is inadmissible to vary the terms of the written contract of insurance relative to the enlargement of insured buildings. *Id.*
10. **CONTRACT IS TO BE CONSTRUED IN LIGHT OF CIRCUMSTANCES UNDER WHICH IT WAS MADE,** and a contract for insurance, to run for a period

of years, made upon a building and machinery, then known to be in process of construction, is applicable to the property when complete as the parties had contemplated. A description in the policy of the building insured as a "saw-mill building" does not limit the use of the property to the purposes of a saw-mill. *Id.*

11. **WHERE CONCURRENT POLICIES** of insurance on property afterwards destroyed were written with the consent of the respective companies, the aggregate amount of such insurance written in the policies is the value of the property as stipulated in each policy, and must be regarded as conclusive, not only as to the true value of the property when insured, but also as to the true amount of loss and measure of damages when destroyed, under the provisions of the Wisconsin statute, which must be regarded as part of the contract of insurance. *Oshkosh G. L. Co. v. Germania F. I. Co.*, 233.
12. **WAIVER OF FORFEITURE.** — Where agent of insurance company, with knowledge of the forfeiture of a policy, and without insisting upon the same, continues to recognize the validity of the policy, and enters into negotiations for the settlement of a loss, whereby the insured incurs expense and trouble, this constitutes a waiver of the forfeiture. *Id.*
13. **FIRE INSURANCE.** — ASSURED HAS AN "ENTIRE UNCONDITIONAL AND SOLE OWNERSHIP" within the conditions in a policy, although the possession of the realty, on which the building and insured property are situate, is held by him under an agreement for its purchase, and the balance due thereon is unpaid at the time the policy is issued, said policy being held by the agent until the land is paid for and the deed given the plaintiff, after which the loss occurs. *Johannes v. Standard F. Office*, 159.

See **TAXATION**, 8.

JUDGMENTS.

1. **COURT IS BOUND TO CONFINE ITS DECREE TO CASE MADE BY PLEADINGS.** *Rorer I. Co. v. Trout*, 285.
2. **DEPARTURE OF COURT FROM ESTABLISHED MODES OF PROCEDURE RENDERS ITS JUDGMENTS VOID**, even though it may have jurisdiction both of the subject-matter and of the parties. A court, though possessing such jurisdiction, is still limited in its modes of procedure, and in the extent and character of its judgments. *Anthony v. Kasey*, 277.
3. **JUDGMENT IS VOID FOR WANT OF JURISDICTION OVER THE DEFENDANTS**, if the summons is not personally served on any of them, and there is no order of the court or judge for its service by publication, and the judgment is entered before the time had elapsed for them to appear and answer, had there been due service by publication. *People v. Greene*, 448.
4. **MOTION TO SET ASIDE A JUDGMENT IS A DIRECT, AND NOT A COLLATERAL, ATTACK THEREON.** *Id.*
5. **JUDGMENT VOID FOR WANT OF JURISDICTION OVER DEFENDANT MAY BE SET ASIDE AFTER THE LAPSE OF TWELVE YEARS**, on motion. The power of the court to vacate a judgment which appears to be void from an inspection of the judgment roll is inherent. It does not expire by lapse of time, nor is it restricted by section 473 of the Code of Civil Procedure of California, designating the time within which motions may be made for relief against judgments entered against a party by mistake, accident, surprise, or excusable neglect. *Id.*

6. **THE EXECUTION OF A VOID JUDGMENT WILL BE STAYED BY THE COURT.** Courts will not permit their process to be abused by attempts thereunder to enforce void judgments. *Id.*
7. **MOST EFFECTUAL MODE OF PREVENTING ABUSE OF PROCESS BY USING IT TO ENFORCE A VOID JUDGMENT** is by extirpating the judgment itself, — by removing a form which is without substance. *Id.*
8. **DECREE OF COURT MAY BE VOID BECAUSE IT HAS EXCEEDED ITS JURISDICTION** in the progress of the cause, even though it obtained jurisdiction rightfully. And where in a suit the sole object of which is the assignment of a widow's dower in the land mentioned in the bill, the county court not only assigns the dower, but also, *sponte sua*, decrees a sale of the residue of the land, it plainly exceeds its jurisdiction, and its decree is void, and may be collaterally attacked. *Seamster v. Blackstock*, 262.
9. **DECREE OF COURT, PROHIBITED BY STATUTE FROM DECREERING SALE OF LAND** for partition when the interest of any party exceeds three hundred dollars, is void where the record affirmatively shows that the interest of each party exceeds that sum. *Id.*
10. **DISMISSAL OF PETITION PRAYING FOR ANNULMENT OF VOID DECREE** cannot affect the rights of the parties to such decree, nor prevent them from attacking it in a collateral proceeding. *Id.*
11. **DEFAULT INCURRED BY FOLLOWING IN GOOD FAITH THE ADVICE OF COUNSEL** SHOULD BE RELIEVED AGAINST, where the judgment is for a large sum, and a meritorious defense exists. In such case it is the duty of the court, where the application is properly made alleging such defense, to open the judgment upon reasonable terms; a refusal to do this is a manifest abuse of discretion. *Whereatt v. Ellis*, 164.
12. **JUDGMENTS. — ELEMENTS NECESSARY TO CONSTITUTE JUDGMENT IN ONE SUIT** BAR to a second suit are: 1. That the issue in the second suit, upon which the judgment is brought to bear, was a material issue in the first suit, necessarily determined by the judgment therein; and 2. That the former judgment was upon the merits. *Liddell v. Chidester*, 387.
13. **ONE CLAIMING IN PRIVITY WITH ANOTHER, WHETHER BY BLOOD, estate; or law, occupies the same situation with such other as to any judgment for or against him, and the record of the judgment is equally admissible as evidence against either.** *Woods v. Montevallo*, 393.
14. **DEFENDANTS ARE ESTOPPED BY A DECREE WHICH DETERMINES THEIR RIGHTS AS AGAINST EACH OTHER, to the same extent as if they were respectively complainant and defendant, instead of being joined as defendants.** *Harmon v. Auditor*, 502.
15. **JUDGMENT AGAINST A COUNTY, in a matter of general interest to all its citizens, is binding on the latter, though they are not parties thereto.** Every tax-payer is a real, though not a nominal, party to such judgment. *Id.*
16. **JUDGMENT IN A SUIT BROUGHT BY TAX-PAYERS OF A TOWN AGAINST THE TOWN AND A RAILROAD COMPANY, TO ENJOIN THE ISSUE BY THE TOWN OF BONDS** to the company, by which it is adjudged that such bonds should issue, is binding on all the other tax-payers of the town, though not parties to the suit. *Id.*
17. **VALUE OF PLEA OF FORMER RECOVERY** is not to be determined by the reasons which the court gave for rendering the former judgment or decree. *Id.*

18. JUDGMENT IS CONCLUSIVE OF ALL QUESTIONS WITHIN THE ISSUE, WHETHER FORMALLY LITIGATED OR NOT. Principle of *res judicata* extends not only to questions of fact and of law which were decided in the former suit, but also to grounds of recovery or defense which might have been but were not presented. *Id.*
19. JUDGMENT ESTABLISHING THE DUTY OF A CITY TO ISSUE BONDS WILL PRECLUDE SUCH CITY AND ITS TAX-PAYERS from subsequently contesting the validity of the bonds on grounds which might have been but were not urged in the former suit; such, for instance, as that the election by which the issue of the bonds was authorized was irregular and void. *Id.*
20. JUDICIARY HAVING ONCE DETERMINED THAT A BOND OR CONTRACT IS VALID CANNOT, AS AGAINST AN INNOCENT PURCHASER of such bond or contract relying on such decision, subsequently impair its obligation. *Id.*
21. RES JUDICATA. — FORMER ADJUDICATION ON QUESTION OF RIGHT TO CUSTODY OF INFANT CHILD, brought up on *habeas corpus*, may be pleaded as *res judicata*, and is conclusive upon the same parties, upon the same state of facts. Such a case is really one of private parties contesting private rights, under the form of proceedings on *habeas corpus*, and is distinguishable from one in which the writ is sued out on behalf of a person unlawfully restrained of his liberty. *State v. Bechdel*, 854.
22. DECREE PRO CONFESSO RENDERED AGAINST CORPORATION, on issues growing out of a contract made by its agents, involves an admission by the corporation of the allegations of the bill as to the validity of the contract, and of the authority of its agents to make it; and the record would be admissible evidence of these matters in a subsequent suit between the parties or their privies. *Alabama G. S. R. R. Co. v. South & N. R. R. Co.*, 401.
23. JUDGMENT. — THERE CAN BE NO JUDGMENT CAPABLE OF BEING DOCKETED, or enforced in any manner, till it is entered in the judgment-book; and a docketing without such entry is of no avail, although a judgment roll, containing a purported copy of a judgment in it, has been made up and filed. The clerk cannot, in such case, lawfully enter the judgment *nunc pro tunc* without the order of the court; but a refusal to grant a temporary injunction to restrain the clerk from entering the judgment *nunc pro tunc* is not beyond the sound legal discretion of the court, and is not necessarily error. *Rockwood v. Davenport*, 872.
24. JUDGMENT LIEN ON LAND TERMINATES, under the statute of Iowa (Code, section 2882), where more than ten years have elapsed since its rendition, and where no steps have during that time been taken to preserve or revive such lien. A junior lien placed upon the land after the expiration of such time takes precedence, and the former judgment cannot then be revived by its owner so as to stand as the first lien. *Boyle v. Maroney*, 657.

See EXECUTIONS, 1.

JUDICIAL SALES.

1. LANDS SOLD IN EXECUTION OF STATUTORY POWER ARE DESCRIBED WITH SUFFICIENT CERTAINTY, if all persons invited by the notice to become bidders are enabled to identify the property, and know what was being sold. *Herrick v. Morrill*, 841.
2. EVIDENCE OF EXTRINSIC FACTS AND CIRCUMSTANCES IS ADMISSIBLE TO IDENTIFY PREMISES SOLD, or to apply the description thereto, but

a fatally defective description in a sale on execution cannot be helped out by evidence of facts tending to prove what property the officer probably intended to advertise and sell. *Id.*

3. **MAXIM CAVEAT EMPTOR STRICTLY APPLIES TO JUDICIAL SALES**, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts, or fraud. But to entitle him to relief such mistake must be mutual, and where fraud or mistake is relied on by him, after the sale has been confirmed, it must be clearly and distinctly charged and proved. *Redd v. Dyer*, 272.
4. **PURCHASER AT JUDICIAL SALE, BY HIS CONTRACT OF PURCHASE, WAIVES ERROR OF COURT** in decreeing the sale without ordering an account of liens to be first taken. *Id.*

See EXECUTIONS; SURETIES.

JURISDICTION.

1. **CONSTRUCTIVE SERVICE OF SUMMONS BY PUBLICATION.** — Minnesota statute (Gen. Stats. 1878, c. 66, sec. 64) authorizing a constructive service of summons by publication, "upon the filing" of an affidavit alleging the non-residence of the defendant, etc., makes such filing a prerequisite condition to an authorized publication. And if the affidavit be not filed until after the publication, even if it be done on the day of the entry of the judgment, the court acquires no jurisdiction, and its judgment is void. *Barber v. Morris*, 836.
2. **IT APPEARING UPON FACE OF RECORD THAT SUMMONS IN ACTION WAS SERVED** in a way ineffectual to confer jurisdiction, it will not be presumed that a valid service was made in some other way. *Id.*
3. **IN MINNESOTA, COURT ACQUIRES NO JURISDICTION BY ITS ATTACHMENT** of property of the defendant in an action, without an authorized service of the summons. *Id.*
4. **STATE COURT HAS JURISDICTION TO REMOVE A CLOUD FROM PLAINTIFF'S TITLE** created by a sale of his property under a judgment entered in one of the national courts against another person. *Wetherell v. Eberle*, 574.
5. **OBJECTION TO JURISDICTION, WHEN TOO LATE.** — Where action against railroad company is brought under statute (section 50 of Kansas Code) which makes provision as to when jurisdiction shall attach in such cases, and is tried in a justice's court, the judgment therein appealed from, and the case again tried, it is too late, upon a motion for a new trial then made, to object for the first time to the jurisdiction. *Kansas etc. Co. v. Rodebaugh*, 715.

See EQUITY, 3; ESTATES OF DECEDENTS; JUDGMENTS.

JURY AND JURORS.

NO ERROR IN REFUSING TRIAL BY JURY IN SUIT PURELY OF EQUITABLE COGNIZANCE, such as action to cancel a note and mortgage. *Lane v. Schlemmer*, 621.

See NEGLIGENCE, 1.

LANDLORD AND TENANT.

1. **VALID LEASE MAY BE MADE OF LAND THEN IN POSSESSION OF LESSOR'S TENANT**, under an unexpired lease; and the lessor is answerable in damages to his lessee if he fails to dispossess such tenant after the expiration

of the first lease, and to deliver possession pursuant to the terms of the first lease. *Rice v. Whitmore*, 479.

2. MEASURE OF DAMAGES RECOVERABLE BY A LESSEE AGAINST HIS LESSOR FOR NOT PUTTING HIM INTO POSSESSION is the value of what the lessee might have made by the use of the leased property during the term of the lease. *Id.*

See GROWING CROPS, 4.

LARCENY.

See CRIMINAL LAW, 20-24.

LICENSE.

- A LICENSE PROPER IS A PERMIT to do business which could not lawfully be done without such license. *San Francisco v. Liverpool etc. Ins. Co.*, 425.

LIENS.

See BANKS AND BANKING, 3; HOMESTEADS, 8; JUDGMENTS, 24; MECHANICS' LIENS.

MARRIAGE AND DIVORCE.

1. DIVORCE. — HUSBAND'S PETITION TO HAVE MARRIAGE CONTRACT ANNULLED, because his wife gave birth to a fully developed child so soon after marriage as to render it certain that it was begotten prior to marriage, will not be granted, unless evidence is produced by him sufficient to overcome the legal presumption that he is the father of the child. *McCullough v. McCullough*, 96.
2. ACTION FOR DIVORCE ON THE GROUND OF CRUELTY COMMITTED BY HUSBAND, IN A PRIOR ACTION, by charging his wife therein with unchastity prior to her marriage with him, cannot be sustained while such former action remains undisposed of, if the charge made by the husband in that action was material therein, because, if material, the issue formed thereby must be first tried in the action wherein the charge was made. *De Haley v. Haley*, 460.
3. CROSS-COMPLAINTS IN ACTIONS FOR DIVORCE. — The court doubts whether the codes permit cross-complaints in actions for divorce, and intimates that while recriminatory matter may be shown by defendant as a bar to plaintiff's cause of action, it may not be the basis of affirmative relief. *Id.*
4. VALIDITY OF DECREE OF DIVORCE IS NOT ASSAILABLE on the ground that the special district judge who tried the case, and rendered the decree, was the county judge of the county when the trial began. Although he be such an officer as is forbidden by the constitution to hold another office, his acceptance and exercise of the duties of another office would operate an abandonment of the office to which he had formerly qualified, and his act as special judge would be valid. *Alsop v. Jordan*, 53.

MARRIED WOMEN.

1. CONTRACTS OF MARRIED WOMEN WERE VOID AT COMMON LAW AND IN EQUITY, so far as imposing personal obligations is concerned, though such contracts might, subject to certain limitations, bind their separate estate. *Snell v. Snell*, 526.
2. MARRIED WOMEN AND MARRIED MEN ARE PLACED ON THE SAME FOOTING, by the statutes of Illinois, with respect to all property rights, including

the means to acquire, protect, and dispose of the same; and the duties and obligations of married women, in respect to these rights and powers, are the same as others *sui juris*. *Id.*

3. **MARRIED WOMEN MAY, IN ILLINOIS, BE COMPELLED TO CORRECT A MISTAKE** which has occurred in the execution of a deed; and such deed, if duly executed, may be reformed in equity by correcting a mistake in the description of property therein, so as to make such deed express what the parties intended it should. *Id.*
4. **MARRIED WOMAN IS ESTOPPED FROM DENYING HER POSITIVE REPRESENTATIONS MADE TO A MORTGAGEE**, who, acting in good faith, and having no knowledge that the facts stated are untrue, is induced by those representations to take a mortgage upon her real estate. *Lane v. Schlemmer*, 621.
5. **DURESS. — AS AGAINST BONA FIDE INDORSEE OF NOTE AND HOLDER OF MORTGAGE, MARRIED WOMAN IS ESTOPPED** from showing that her husband, acting in collusion with the original mortgagee, exercised duress, and thereby obtained her signature to a negotiable note, and the mortgage to secure same, as well as to an affidavit containing material representations affecting the mortgage on which the indorsee relied in good faith, although the truth may be shown against the original mortgagee. *Id.*

See HUSBAND AND WIFE; WILLS, 4.

MASTER AND SERVANT.

1. **CONTRACT OF EMPLOYMENT**, entered into by telegraphic correspondence, agreeing to serve for "one thousand dollars a year," unexplained, is a contract for a year's service for that sum, to be paid in gross. *Liddell v. Clidester*, 387.
2. **REMEDIES OF EMPLOYEE WRONGFULLY DISCHARGED BEFORE END OF TERM**:
1. He may elect to treat the contract as rescinded, and sue on a *quantum meruit*; or 2. He may sue for an entire breach of the contract by the defendant, and recover all damages sustained up to the trial; or 3. He may wait until his wages would mature under the terms of the contract, and sue and recover as upon performance on his part. *Id.*
3. **WHEN WAGES ARE PAYABLE IN INSTALLMENTS, SUITS MAY BE BROUGHT ON** the several installments as they mature. *Id.*
4. **RECOVERY OF JUDGMENT BY DISCHARGED EMPLOYEE**, had in an action claiming wages for the month in which he was discharged, is conclusive of the fact that his wages were due and payable in monthly installments, and also estops the defendant from denying that he discharged the plaintiff without cause. *Id.*
5. **SERVANT, THOUGH A MERE VOLUNTEER, AND NOT EXPECTING ANY PAY FOR THE WORK DONE**, is, if engaged at the request of the man in charge of the work, for the time being, the servant of the master, and entitled to the same protection as his other servants. *Johnson v. Ashland W. Co.*, 243.
6. **WHEN FAILURE TO EMPLOY** a sufficient number of men to perform the work is the proximate cause of injury to a servant, the master is liable, unless such servant may fairly be said to have assumed the risk incident to carrying on the work with an insufficient number of men. *Id.*
7. **EMPLOYEE OF RAILROAD COMPANY IS GUILTY OF CONTRIBUTORY NEGLIGENCE**, when, in violation of the company's rules, he puts himself in a position of obvious danger, in consequence of which he is injured. *Daracott v. Chesapeake etc. R. R. Co.*, 266.

8. **DUTY OF RAILROAD COMPANY TO ITS EMPLOYEES IS DISCHARGED BY EXERCISE OF ORDINARY CARE**, by which is meant such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise. Such company is not bound to change its machinery in order to apply every new invention or supposed improvement in appliance, but may use an appliance less safe than another in use, provided its employees be not deceived as to the degree of danger that they incur. *Id.*
9. **EMPLOYEE OF RAILROAD COMPANY IS BOUND TO EXERCISE ORDINARY CARE** to avoid injuries to himself, and any negligence on his part amounting to the want of ordinary care, which is the proximate cause of the injury, will defeat an action against the company. *Id.*
10. **DANGER INCIDENT TO USE OF THREE-LINK COUPLINGS FOR RAILROAD CARS** may be considered as one of the ordinary perils, the risk of which, by his contract of service, a brakeman, who had ample means of knowing that such couplings were often made by the company, assumes. *Id.*
11. Where a party is injured by being jammed between two cars while going along a beaten path, accustomed to be kept open between said cars, which path had been used for a long time prior thereto by the company's employees, and over which he was walking in order to commence his usual duty as a wiper of locomotives for the defendant company, such party is the company's employee, although he was not actually laboring for it at the time of said injury; in such case said employee is a fellow-servant of those in management of the train, whose negligence caused the injury, and he cannot recover for said injury. *Ewald v. Chicago & N. W. R'y Co.*, 178.
12. **RAILROAD COMPANIES. — IT IS DUTY OF RAILROAD COMPANY TO COVER BRIDGES AND CULVERTS** on the line of its road within its yards, and within a reasonable distance of switches, wherever, in the proper performance of their duties, it would naturally and reasonably be anticipated that brakemen would be apt to go in making couplings. *Franklin v. Winona etc. R. R. Co.*, 856.
13. **IF NEGLIGENCE OF MASTER COMBINES WITH NEGLIGENCE OF FELLOW-SERVANT**, and the two contribute to the injury of another servant, himself free from negligence, the master is liable. *Id.*
14. **QUESTION FOR JURY. —** Whether, under the facts of the particular case, it was the duty of the railroad company, in the exercise of ordinary care, to cover a certain culvert, was a question properly submitted to the jury. *Id.*
15. **EMPLOYEE CANNOT RECOVER FOR NEGLIGENCE OF CO-EMPLOYEE** engaged in the prosecution of a common business, where the action is against employer. *Theleman v. Moeller*, 663
16. **WHO ARE FELLOW-SERVANTS — QUESTION OF FACT FOR JURY. —** Employee who is charged with no other duty than to inspect machinery, in the operation of which injury occurs, is not a fellow-servant with the engineer. But if in addition to its care and inspection the employee is required to repair the machinery when broken or defective, and also to run the engine which propels it, he is a fellow-servant. In such case the issue as to whether the engineer was a fellow-servant, when the evidence tended to show that his negligence caused the injury complained of, should have been submitted to the jury, and a refusal of the court to do this constitutes error. *Id.*

17. **RISKS INCIDENT TO EMPLOYMENT.**—Employee of railroad company, who had the management of the business at the company's yard, including the switching and making up of trains, and who was familiar with the situation of the tracks in the yard, and knew that a certain frog was left in a condition unsafe and dangerous to persons switching cars, must be held to have taken upon himself the risks incident to the situation of the track, from which he was not relieved by a conditional promise by a section foreman to improve the track at that point "if he got time some Saturday afternoon." The company was not bound by such promise, and there was no reasonable connection between it and the employee's continuance in the business. *Wilson v. Winona etc. R. R. Co.*, 851.
18. **SERVANT IS NOT NECESSARILY GUILTY OF CONTRIBUTORY NEGLIGENCE**, because he works near dangerous machinery uncovered, knowing its condition, although the master be clearly guilty of negligence in leaving the machinery in that condition. Master and servant do not stand upon the same footing in that regard. *Wuotilla v. Duluth Ins. Co.*, 832.
19. **IT IS MASTER'S DUTY TO SUPPLY SAFE INSTRUMENTALITIES** for the use of his servant, and he is bound to exercise reasonable diligence in informing himself as to whether his machinery is safe; whereas, the servant, in the absence of notice to the contrary, or something to put him on inquiry, has a right to assume that his master has done his duty in this respect, and to rely on his superior judgment. *Id.*
20. **MERE FACT THAT SERVANT KNOWS DEFECTIVE CONDITION OF INSTRUMENT** with which he works does not necessarily charge him with contributory negligence, or the assumption of risks growing out of the defects. The question is, Did he know, or ought he, in the exercise of ordinary common sense and prudence, to have known, the risks to which the condition of the instrument exposed him? *Id.*
21. **EVIDENCE.**—**IN ACTION AGAINST EMPLOYER FOR INJURY CAUSED EMPLOYEE** in using defective tool, fellow-workmen may testify to the actual condition of such tool, describing its defects; also that they had worked with it, and that it was unsafe at the time of the accident. *Atchison etc. R. R. Co. v. Sadler*, 729.
22. **EVIDENCE.**—**KNOWLEDGE BY EMPLOYER OF UNSAFE CONDITION OF DEFECTIVE TOOL**, causing injury to employee, may be proven by the testimony of a fellow-workman that he had told the foreman having charge of the work that the tool was unsafe. *Id.*
23. **EMPLOYER—PROMISE TO FURNISH NEW TOOLS IN PLACE OF DEFECTIVE ONES—NEGLIGENCE.**—Where a railroad company had knowledge that tools in use by its workmen were defective, and through its foreman promised to furnish them new ones, an individual employee in whose presence and hearing the promise is made has a right to rely thereon, and is entitled to its benefit. In such case, if a reasonable time has expired within which new and perfect tools ought to have been furnished, permitting their continued use is gross negligence, and employee injured in using them may recover therefor. *Id.*
24. **EMPLOYEE WHO CONTINUES IN SERVICE OF HIS EMPLOYER AFTER NOTICE OF DEFECT AUGMENTING DANGER** of the service assumes the risk as increased by the defect, even though he may object or complain, unless he is induced to continue by an express or implied promise of the master to remove the cause that augments the danger. *Indianapolis etc. R'y Co. v. Watson*, 578.

25. **IF EMPLOYEE'S SERVICE CANNOT BE CONTINUED WITHOUT CONSTANT AND IMMEDIATE DANGER**, which is so great that a reasonably prudent man would not assume it, and its character as well as the danger itself are fully known to the employee, he assumes the risk if he continues in the service, although his employer had promised to remedy the defect. *Id.*
26. **SERVICE OUTSIDE OF ORDINARY EMPLOYMENT.** — To make master responsible for injury to servant, it must appear that the former has neglected some duty which he owes the latter. The mere fact that the master has requested the servant to perform a temporary work outside of his ordinary employment is no violation of duty; whether it is or not depends upon the surrounding circumstances. *Cole v. Chicago etc. R'y Co.*, 201.
27. **WHERE SERVANT IS ORDERED TO PERFORM WORK OUTSIDE OF HIS ORDINARY EMPLOYMENT**, of a dangerous character, requiring peculiar skill in its performance, and the servant has not the requisite knowledge or skill required, and such want of skill or knowledge is known or might be reasonably supposed to be known to the master, in case the servant is injured while so employed the master is liable, even though the servant undertook the work without objection or protest on his part. *Id.*
28. **TO MAKE MASTER LIABLE THROUGH NEGLIGENCE** for resulting injuries to servant ordered to perform duties outside of his ordinary employment, it must be shown that the master knew, or by the exercise of reasonable care and observation might have known, of the inexperience, disqualification, and immature judgment of the servant employed to perform the duty required. *Id.*
29. **WHERE SERVANT OF MATURE YEARS** and of ordinary intelligence and experience is directed to do a temporary work outside of his ordinary employment, and consents to do such work, without objection on account of his want of knowledge, skill, or experience in performing such work, and injury results to him, negligence cannot be predicated upon these facts alone against the master. *Id.*

MAYHEM.

See **CRIMINAL LAW**, 25-30.

MECHANICS' LIENS.

1. **MECHANIC'S LIEN IS ORDINARILY LIMITED TO THE INTEREST** of the person for whom, or at whose instance, the materials were furnished or the labor performed. *Henderson v. Connelly*, 490.
2. **MECHANIC'S LIEN PREVAILS OVER THAT OF A VENDOR**, and ATTACHES TO HIS TITLE where he has not conveyed the property, if the contract of sale provided that the vendee should go on and build upon the premises. The only reasonable construction of this provision is that the purchaser was thereby authorized by the vendors to contract for the erection of a building on lands to which they held the legal title. *Id.*

MINES AND MINING.

1. **LESSEE OF MINE HAS NO OPTION TO WORK OR NOT TO WORK IT** for an indefinite time, where the rent reserved to the lessor is a royalty of so much per ton on the ore taken out. *Rorer I. Co. v. Trout*, 285.
2. **MINERALS UNSEVERED FROM SOIL**, or "IN PLACE," ARE PARTS OF FREEHOLD, and constitute landed property capable of a possession distinct

from that of the surface, and may form a separate corporeal hereditament, which is the subject of a distinct inheritance. *Williams v. Gibson*, 368.

3. IT IS ONLY WHEN MINERALS ARE SEVERED FROM SOIL THAT THEY BECOME PERSONAL CHATTELS, and it is only where the right to dig or to mine them is not exclusive that it may be classed as an incorporeal right, or easement merely in the nature of a license. *Id.*
4. EXPRESS GRANT OF ALL MINERALS OR MINERAL RIGHTS IN TRACT OF LAND is, by necessary implication, the grant also to open and work the mines, and occupy so much of the surface as may be reasonably necessary for such purpose. And this implied right to occupy so much of the surface as may be needed to open and work the mines is not limited, but rather strengthened, by the special grant of certain timber and water privileges, and of the right of way to and from the mines. *Id.*
5. OWNER OF MINERALS AND MINING RIGHTS MUST USE HIS OWN SO AS NOT UNREASONABLY TO INJURE HIS NEIGHBOR, the owner of the surface or soil; and must so conduct his mining operations as to leave a sufficient support for the surface. What improvements are reasonably necessary for the profitable and beneficial working of the mines, and the inquiry as to how much of the surface may be reasonably needed for this purpose, are questions of fact to be determined by the jury. *Id.*
6. OWNER OF MINING RIGHTS CANNOT USE SURFACE OR MATERIALS OF the land for changing the character of the mineral to which he is entitled, as for converting coal into coke; and in ejectment for the surface of the land, evidence as to how much of the surface was or might be needed for the erection of coke-ovens is properly excluded. *Id.*
7. EJECTMENT FOR SURFACE OF MINERAL LAND—EVIDENCE.—Where, in an action in the nature of ejectment for the surface of land used in working a mine, it appeared that the defendant had established a supply store, it is not error to admit evidence showing that two other stores were located near the mines, for the purpose of testing the urgency of the alleged necessity impelling the defendant to occupy the land for such purpose; and evidence of the value of improvements made by the defendant around the mines is relevant as affecting the rental value of the land sued for. But it is not competent to show, in such action, that particular individuals in the neighborhood carried on a mine without a storehouse for supplies, the business of mining in the vicinity being of a date too recent to establish a custom. *Id.*

MISTAKE.

1. POWER OF COURTS OF EQUITY TO AFFORD RELIEF FROM THE CONSEQUENCES OF MUTUAL MISTAKES of parties to written instruments is not strictly limited to mistakes of fact, but extends also to mistakes of law. If nothing more than the bare mistake of law alone be shown as a reason for relief, it will rarely, if ever, be granted; yet equity will interfere where it further appears that the defendant, availing himself of the opportunities afforded by the mistake, will take an unconscionable advantage, without consideration, the plaintiff being blameless, and the defendant being in no position entitling him to equitable protection. *Benson v. Markoe*, 816.
2. ONLY VERY CLEAR AND CONVINCING PROOFS WILL BE SUFFICIENT TO OVERCOME PRESUMPTION that the written instruments which parties have executed for the purpose of evidencing and carrying into effect

their agreements are, in legal effect or in terms, contrary to their intention. *Id.*

3. IN GENERAL, MISTAKE OF ONE PARTY ONLY TO INSTRUMENT DOES NOT JUSTIFY REFORMATION OF IT, so as to subject the other party to obligations which he never intended to assume, or to bind him to do or to receive what he never contracted for or contemplated. But relief may be granted in such case of mistake, when the parties can be replaced in their former position. *Id.*
4. MONEY PAID THROUGH A MISTAKE OF FACT, IN RESPECT TO WHICH BOTH PARTIES WERE EQUALLY BOUND TO INQUIRE, may be recovered back. *Wolf v. Beaird*, 565.
5. EXECUTOR WHO PAYS A CLAIM IN FULL UNDER A MISTAKE OF FACT, which mistake was to the effect that the assets of the estate were ample to pay all claims against it, when, in truth, there were claims of which he had then no knowledge, may recover of him to whom payment was thus made the amount paid in excess of the amount to which he is shown to have been entitled on the final settlement of the estate. *Id.*
6. DEGREE OF PROOF.—TO ESTABLISH MISTAKE, party alleging it must prove it clearly and satisfactorily, and perhaps beyond a reasonable doubt; and to charge that to establish mistake the evidence in its favor must be more weighty, convincing, or satisfactory than the evidence of the other party is error, as a mere preponderance of evidence is not sufficient. *Parker v. Hull*, 224.

See EQUITY, 1; MARRIED WOMEN, 3; MORTGAGES, 7.

MORTGAGES.

1. MORTGAGES—PARTY TO FORECLOSURE SUIT.—MORTGAGOR HAVING SOLD AND CONVEYED his entire interest in the land, being a mere equity of redemption, is not a necessary party to a suit brought to foreclose the mortgage lien. His assignee only need be made a party defendant. *Boutwell v. Steiner*, 375.
2. FORECLOSURE SUIT — LIMITATION. — PURCHASER FROM MORTGAGOR IS CHARGED WITH NOTICE of lien created by mortgage duly recorded; and a suit to foreclose the mortgage is not barred, as in his favor, short of a period of ten years from the commencement of his possession under the purchase. *Id.*
3. DECREE NOT AFFECTING MORTGAGEE. — MORTGAGEE OF HUSBAND NOT MADE PARTY to a bill filed by the wife against her husband, setting up a resulting trust in the mortgaged lands, is in no manner prejudiced by the decree rendered therein in favor of the wife. *Id.*
4. PURCHASE OF PROPERTY BY MORTGAGEE AT HIS OWN SALE, WHEN ALLOWED TO STAND. — If a mortgagee buys personal property at his own sale, under a power in the mortgage, and the mortgagor interposes no objection showing his disapproval of the purchase, and asking to disaffirm the sale, a subsequent purchaser from him cannot do so in a suit brought nine years afterwards to foreclose the mortgage on land. *Id.*
5. FORECLOSURE EXPENSES. — STIPULATION IN A MORTGAGE, WHEREBY MORTGAGOR BINDS HIMSELF TO PAY ALL COSTS of recording the mortgage, and the costs and expenses attending the enforcement of the collection of the mortgage debt, is binding on his assignee or purchaser from him, and fastens a lien on the land for these reasonable expenses. *Id.*

6. **A REDEMPTION BY THE MORTGAGOR'S GRANTEE, OF PROPERTY SOLD UPON EXECUTION**, based upon a decree of foreclosure for part of the debt, divests the property of a judgment lien for the remaining part of the mortgage debt, although had the judgment debtor himself redeemed, all the judgments against him which would be liens upon the property if it had not been sold upon execution would be liens after redemption. *Harms v. Palmer*, 691.
7. **REVIVAL OF MORTGAGE — MISTAKE.** — New mortgage is renewal of old one to the extent of old mortgage debt, and takes precedence of a lien of judgment obtained after the old mortgage was given and before the new mortgage was executed, where it appears that the mortgagee under the second mortgage was also the mortgagee under the first mortgage; that both he and the mortgagor were ignorant of the existence of the judgment, and that he would not have advanced the money on the second mortgage and canceled the old one had he known of the judgment lien. *Young v. Shaner*, 701.
8. **DELIVERY OF MORTGAGE CANNOT TAKE PLACE WHEN THE MORTGAGEE HAS NO KNOWLEDGE THEREOF**; and if a mortgage is filed for record without his knowledge, it must be held subordinate to attachments subsequently levied; and an acceptance of the mortgages by the mortgagees subsequent to the attachment levy does not relate back to the original filing so as to make the mortgage lien attach as paramount. *Nat. St. Bank v. Morse*, 670.
9. **JUDGMENT IN FORECLOSURE, DESCRIPTION OF LAND IN.** — Where the description in the mortgage, judgment of foreclosure, and sheriff's deed is of a tract by metes and bounds, "excepting, however, those portions of the above-described tract which are described in those certain conveyances executed by the party of the first part hereto, which are recorded respectively (giving the books and pages of the county records), to which deeds and the records thereof reference is hereby made for further description, the remainder of the tract which is hereby conveyed containing about 719 acres," the judgment and deed are not void. *Crosby v. Dowd*, 61 Cal. 557, *contra*, is here overruled. *De Sepulveda v. Baugh*, 455.
10. **TRUST DEED. — MORTGAGOR OR GRANTOR IN DEED OF TRUST HOLDS FULL TITLE**, legal and equitable, to the land, subject to the lien created by the instrument for the payment of the debt it is given to secure. *Fuller v. O'Neal*, 59.
11. **MORTGAGES. — WHEN DEBT SECURED BY MORTGAGE IS PAID BY ONE UNDER NO OBLIGATION TO PAY IT, HE IS SUBROGATED** to the rights of the mortgagee in the mortgaged property, and will hold the title so acquired against subsequent encumbrances, although he took no formal transfer of the mortgage, and although he had also acquired the equity of redemption. *Fears v. Albee*, 78.
12. **IF PERSON ADVANCING MONEY TO PAY ON MORTGAGE, UNDER AGREEMENT** with the owner of the equity of redemption that it should be assigned to him as security for the money advanced, takes a discharge of the mortgage, he is still entitled to be subrogated to the rights of the mortgagee, and have the discharge vacated. *Id.*
13. **MORTGAGEE CANNOT ACQUIRE TAX TITLE, AND THEREBY DEFEAT MORTGAGOR'S TITLE**, and the same rule applies to one who holds under the mortgagee. The tax sale operates as payment of the taxes. *Eck v. Swenson*, 690.

14. **MORTGAGEE CANNOT ACQUIRE TAX TITLE**, and thereby cut off the mortgagor's equity of redemption. *Burchard v. Roberts*, 148.
15. **PURCHASE OF LAND AT A TAX SALE** by a party for the benefit of the mortgagee operates as a payment of the tax and a redemption of the land therefrom, both as to the mortgagor of the land against whom the taxes were assessed while in possession, but who was not the real owner, also as to the actual owners in fee; and a deed based on such sale is therefore invalid, and no title paramount to that of the true owner can be thereby acquired. *Id.*
16. **CHATTEL MORTGAGE IS TRANSFER OF TITLE AS SECURITY**, and strictly, at law, must contain words of conveyance. But the courts are so strongly inclined to construe the agreements of parties to make them effectual, that no formal words of transfer are required to make an agreement operate as a mortgage. Although terms are used which would imply something else, yet if it is apparent that a mortgage was intended, the court will so construe it. *Merrill v. Ressler*, 822.
17. **STIPULATION IN LEASE OF REALTY, RESERVING TO LESSOR a lien for the rent on the goods and chattels of the lessee placed on the demised premises, to be enforced on the non-payment of the rent, in the same manner as in case of a chattel mortgage by taking possession of the property and selling it, is in effect a chattel mortgage, in such sense as to bring the lease within the provisions of the statute requiring chattel mortgages to be filed.** *Id.*
18. **CHATTEL MORTGAGE IS VOID FOR UNCERTAINTY** when it is given for cattle and their increase, if it contains no statement as to their present or past ownership, nor of the place where they are or have been kept, although the animals are described separately, their color, age, and name being given. *Warner v. Wilson*, 710.
19. **IN CHATTEL MORTGAGE IT IS NOT A SUFFICIENT LOCATION OF THE PROPERTY** to say that it is in a county named. *Id.*
20. **IN CHATTEL MORTGAGE, NO PRESUMPTION THAT MORTGAGOR OWNS THE PROPERTY OR THAT IT EXISTS ARISES** from the execution of the mortgage. *Id.*
21. **DEBTS OF THE MORTGAGOR PAID BY THE MORTGAGEE MUST BE IDENTIFIED**, either by the petition itself or by evidence based on proper averments, as being the same debts as those described in the mortgage; otherwise no recovery can be had against the assignee of the mortgagor which would give the mortgagee a preference over other creditors. The lien or security continues so long as the debt is shown to be the same as that described in the mortgage. *New v. Sailors*, 632.
22. **IMPLIED AGREEMENT TO ACCOUNT FOR PROCEEDS OF SALE.**—It will be presumed, until the contrary appears, that a mortgagor who is permitted to retain possession of and sell mortgaged chattels does so under an agreement to account as the agent of the mortgagee, and the proceeds will be regarded as applied to the liquidation of the mortgage debt, whether they have been actually paid over or not. If, however, it appears that there was an understanding that the mortgagor was not to account, but that he might deal with the property to all intents and purposes as if it were his own, an inference of fraud arises which renders the mortgage void. *Id.*
23. **CHATTEL MORTGAGE WHICH AUTHORIZES THE MORTGAGOR to sell the goods and replace them with others to be paid for out of the proceeds of such sales, there being no agreement that the mortgagor might dispose of the**

proceeds of sales of the mortgaged property for his own use and benefit, is valid, though the attempt to extend the security of the mortgage over after-acquired goods is unavailing, except, perhaps, as a license to seize the goods. *Roundy v. Converse*, 240.

24. **EXEMPTIONS.** — WHERE MORTGAGOR WHEN EXECUTING A CHATTEL MORTGAGE does not enumerate or reserve the exemption provided by section 2982, subdivision 8, of the Revised Statutes of Wisconsin, nor claim it while the property is in the hands of the mortgagee, he loses all right, after the property is sold under the mortgage, to claim the amount of such exemption in the proceeds of the sale. *Id.*

See GROWING CROPS, 3, 4; HOMESTEADS, 7.

MUNICIPAL CORPORATION.

1. **ORDINANCE VOID IN PART.** — If there are several prohibitions in an ordinance, some of which are void and others valid, if a penalty is provided applying to each offense separately, the ordinance may be enforced in respect to offenses of which it is valid, as if the void portions had been omitted. *Poyer v. Des Plaines*, 494.
2. **CONSTITUTIONAL LAW.** — IT IS CLEARLY WITHIN LEGISLATIVE POWER OF STATE, so far as any limitations resulting from the federal constitution are concerned, to authorize the passage by city councils of ordinances which prohibit the sale of certain commodities, either generally or beyond specified limits, or within certain hours of the day. *Ex parte Boyd*, 328.
3. **ID. — MUNICIPAL ORDINANCE.** — IT IS CLEARLY WITHIN COMPETENCY OF GENERAL ASSEMBLY, UNDER CONSTITUTION OF ALABAMA, to delegate to a municipal corporation the power to establish public markets, and to confine the sale of commodities, which, in consideration of public health, require police inspection and supervision, to such markets, even if a result of the exercise of this power should be the destruction of an existing and long-established business. *Id.*
4. **ID. — MUNICIPAL ORDINANCES REGULATING SALES OF COMMODITIES,** enacted under legislative authority, must be consistent with general laws, reasonable in their provisions, and referable to the performance of some recognized governmental function. *Id.*
5. **ID. — MUNICIPAL ORDINANCE, LIKE STATUTE, MAY BE VALID** in some of its provisions, and invalid as to others, and a party assailing the ordinance because of the latter must show himself to be affected thereby. *Id.*
6. **ID. — POWER GIVEN IN CITY CHARTER TO "REGULATE AND MANAGE MARKETS"** authorizes the city council to adopt ordinances prohibiting the sale of commodities at stores, stalls, and places in the city outside of the market-houses. While the power "to regulate" does not authorize prohibition in a general sense, yet it confers authority to confine the business referred to to certain hours of the day, to certain localities or buildings in a city, and to prescribe rules for its prosecution within those hours, localities, and buildings. *Id.*
7. **MUNICIPAL CORPORATION WHICH IS AUTHORIZED TO REGULATE ANY GIVEN SUBJECT,** and to require those who do any act to obtain a license or permit therefor, may charge the person procuring it a reasonable fee to cover the labor and expense attending the issue of such license or permit, although the power to do so is not expressly given in the charter. This

- fee is not a tax, nor its exaction an exercise of the taxing power. *St. Paul v. Dow*, 811.
8. **ID. — AMOUNT OF FEE CHARGED BY MUNICIPAL CORPORATION FOR "BUILDING PERMIT"** may be graduated according to the estimated cost of the building. *Id.*
 9. **A MUNICIPAL CORPORATION MAY PROHIBIT THE KEEPING THEREIN OF ANY TIPPLING-HOUSE, DRAM-SHOP, OR BAR-ROOM.** Such prohibition does not conflict with any provision of the constitution of the state, nor of the United States. *Ex parte Campbell*, 418.
 10. **ASSESSMENTS. — ORDINANCE IS UNCONSTITUTIONAL**, and lacks the essential element of "due process of law," when it authorizes an assessment against property, but makes no provision for notice, and affords the owner no opportunity to be heard concerning the correctness of the assessment. The notice and hearing required by the constitution need only be adapted, however, to the nature of the assessment proposed. *Garvin v. Daussmann*, 637.
 11. **PROCEEDINGS FOR STREET IMPROVEMENTS REQUIRE NOTICE AND HEARING** to warrant the imposition of a charge by "due process of law," where the cost of such improvement is to be apportioned among those benefited. *Id.*
 12. **VALIDITY OF ORDINANCE. — ALTHOUGH NO PROVISION IS MADE FOR NOTICE AND HEARING** in proceedings for street improvements by either the charter of a city, or an ordinance enacted thereunder, yet if under the ordinance in question the assessment could only be enforced by proceedings similar to those in foreclosing mortgages where notice would be required and an ample opportunity be afforded for inquiring fully into the legality and amount of the assessment, such ordinance is valid. *Id.*
 13. **PROVISION IN CITY CHARTER, THAT MERE INFORMALITIES IN MAKING ASSESSMENT SHALL CONSTITUTE NO DEFENSE**, deprives the property owner of no substantial rights, and does not affect the merits of the proceedings under which improvement was completed, but only refers to technical or formal objections. *Id.*
 14. **THOSE WHO CONTRACT WITH MUNICIPAL CORPORATIONS** are bound to know the extent of the powers of their officers. *Sutro v. Pettit*, 442.
 15. **DOCTRINE OF ULTRA VIRES IS APPLIED WITH GREATER STRICTNESS** to municipal bodies than to private corporations; and, in general, a municipal corporation is not estopped from denying the validity of a contract made by its officers, when there has been no authority for making such a contract. *Newbery v. Fox*, 830.
 16. **EXECUTED CONTRACT — DEFENSE OF ULTRA VIRES. — CONTRACT FOR GRADING STREET**, made by the officers of a municipal corporation in the first instance, the duty to make the improvement not having been first imposed upon the adjacent proprietors, as required by the charter of the municipality, is unauthorized; and the other contracting party, not having been misled as to any fact, is not entitled to recover after performance on his part. *Id.*
 17. **WHEN, ACTING WITHIN ITS GENERAL POWERS**, a city makes a contract for the grading of a street, in which it is provided that the contractors, in consideration of doing the work, are to receive and appropriate to their own use all the stone in that part of the street, and in pursuance of the contract they proceed to take out and dispose of the stone, they are the agents of the city in the premises, and the city is responsible for their acts. *Rich v. Minneapolis*, 861.

18. **FORFEITURE OF PRIVILEGE TO CONSTRUCT STREET-RAILWAY — SUCH PRIVILEGE A LICENSE — RENEWAL NECESSARY.** — If privilege of occupying street and building railway is conferred by municipality for a limited time, when that time expires the privilege no longer exists. Such consent is a mere license, and until it is availed of, no contractual obligation or relation arises which requires a judicial declaration of forfeiture. After the time limit expires, renewal of the privilege is necessary to permit the company to occupy the streets and build its road. *Atchison S. R. Co. v. Nave*, 800.
19. **MUNICIPAL CORPORATION IS LIABLE FOR INJURIES SUSTAINED BY REASON OF ITS NEGLIGENCE** to keep its streets in proper and safe condition, where it has by its charter the power to lay out, improve, light, and keep its streets in order. *Clark v. Richmond*, 281.
20. **MUNICIPAL CORPORATION IS LIABLE FOR PERMITTING EXCAVATION TO REMAIN UNFENCED**, or without proper guards, in such close proximity to the highway that one rightfully using it may, without any fault on his part, but as the result of an unintentional deviation or an accidental misstep, sustain injury by falling into such excavation. But it is not liable where, in order to reach the place of danger, the party injured must become an intruder or trespasser upon the premises of another. *Id.*
21. **MUNICIPAL CORPORATION IS NOT LIABLE FOR LEAVING PLACE ALLURING TO CHILDREN** exposed without barriers, when such place can only be reached by leaving the highway and trespassing upon the premises of another. Its duty does not extend to the protection of children against every sudden freak that may possess them. *Id.*

See BONDS, 2, 3; FRAUD; NUISANCES, 3; RAILROADS.

MURDER.

See CRIMINAL LAW.

NAVIGABLE RIVERS.

See BOUNDARIES.

NEGLIGENCE.

1. **NEGLIGENCE, WHEN NOT A QUESTION OF FACT.** — Where there is no conflict of testimony, the court must necessarily decide the legal effect of the testimony in the record. In doing this, there is no departure from the long-settled rule that the evidence will not be weighed by this court. *Indianapolis etc. R'y Co. v. Watson*, 578.
2. **CONTRIBUTORY NEGLIGENCE, QUESTION OF, PROPERLY SUBMITTED** to the jury under the circumstances of the particular case. *Alabama G. S. R. R. Co. v. Arnold*, 354.
3. **QUESTION OF CONTRIBUTORY NEGLIGENCE — WHETHER FOR JURY OR COURT.** — If the testimony relating to such negligence is conflicting, or not being conflicting if the inferences to be drawn therefrom are doubtful or uncertain, the question of negligence is for the jury. But if the evidence is undisputed, and the inferences therefrom plain and certain, the question is one of law for the court. *Seefeld v. Chicago etc. R. R. Co.*, 168.
4. **OWNER OF PREMISES WHO DIRECTLY OR BY IMPLICATION INDUCES PERSONS TO ENTER** on and pass over them, thereby assumes an obligation that they are in safe condition, and suitable for such use, and for a breach of this obligation he is liable in damages to a person injured

thereby. Where, therefore, the direct and usual path to a railroad depot is over a switch on which freight-cars frequently stand, with an opening habitually left between them so as to leave the path unobstructed, and this path is constantly used by persons getting on and off at the depot, without such use being at any time discountenanced by the company or its officials to whom it is known, it will be assumed that the company invites persons having business at the depot to use that path between the cars in going there, and it is not negligence *per se* for them to do so; and if a person in passing between the cars is injured by the cars being suddenly and without warning run together, the company is liable in damages for the injury. *Nichols v. Washington & O. R. R. Co.*, 257.

5. ONE WHO SETS OUT A FIRE UPON HIS OWN LAND IS LIABLE for an injury done by its communication to the property of another, only where he is negligent in setting out the fire, or in not preventing it from spreading outside his own land; nor is negligence to be imputed to him because he did not anticipate a little whirlwind which arose suddenly, and carried the fire beyond his control. *Sweeney v. Merrill*, 734.
 6. IF ONE IS GUILTY OF NEGLIGENCE IN SETTING OUT FIRE, OR IN HIS ATTEMPTED CONTROL OF IT, it is immaterial whether he was diligent or negligent in attempting to save the destroyed property by back-firing, if in any event such property would have been destroyed. *Id.*
- See BANKS AND BANKING, 6, 7; COMMON CARRIERS; CORPORATIONS, 2; DAMAGES; HIGHWAYS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 19, 21; RAILROADS; TELEGRAPHS.

NEGOTIABLE INSTRUMENTS.

1. BILLS AND NOTES — CONSIDERATION. — IT IS SUFFICIENT COMPLIANCE WITH ALABAMA STATUTE, Code of 1886, section 141, requiring one who sells a fertilizer to tag each package sold, if the seller, at the request of the buyer, delivers tags for each package to the latter on his promise to attach them; and a note the consideration of which was a commercial fertilizer so sold is valid. *Steiner v. Ray*, 332.
2. WARRANT ON STATE TREASURY PAYABLE TO A B, OR ORDER, is transferable so far as to authorize the holder to demand payment, and to maintain in his own name an action thereon. *Nat. Bank v. Herold*, 476.
3. ASSIGNMENT AND DELIVERY OF WARRANT ON STATE TREASURY is, in equity, an assignment of the debt and an authority to the assignee to receive the money. *Id.*
4. STATE TREASURER MUST PAY WARRANT REGULARLY DRAWN ON HIM, without stopping to inquire whether the persons on account of whose claims the warrant was drawn have been paid or not. *Id.*

See BONDS, 1, 2.

NEW TRIAL.

1. APPELLATE COURT WILL NOT INTERFERE TO GRANT NEW TRIAL when there was evidence to sustain the verdict, unless there was manifest prejudice on the part of the jury. *Gulf etc. R'y Co. v. Benson*, 74.
2. NEW TRIAL WILL NOT BE GRANTED ON GROUND OF SURPRISE, arising from the testimony of a witness being different from what counsel anticipated it would be, it not being shown that the witness intentionally deceived or misled counsel. Nor will a new trial be granted to enable one to obtain

evidence which ordinary diligence could have procured on the trial, if desired, and especially if such evidence is merely cumulative. *Fears v. Albee*, 78.

NOTICE.

See BONA FIDE PURCHASERS.

NUISANCES.

1. COMPLAINT AGAINST PUBLIC NUISANCE, to form basis of action, must allege a special damage peculiar to the plaintiff, and resulting from an injury of a different character from that suffered by the rest of the public; nor must the damages alleged rest entirely in contemplation. *Clark v. Chicago and N. W. R'y Co.*, 187.
2. SEVERAL PERSONS MAY UNITE AS PLAINTIFFS, although they are the owners of different but adjacent lots and buildings, to restrain the building of a street-railroad not authorized by the city, where such threatened injury or nuisance is common to all, and the injury would be special and peculiar to the plaintiffs, independent of and different from the general injury to the public. *Atchison S. R. Co. v. Nave*, 800.
3. MUNICIPAL CORPORATION MAY NOT DECLARE THAT TO BE A NUISANCE WHICH IN FACT IS NOT, though it is by law empowered to declare what shall be a nuisance. *Des Plaines v. Poyer*, 524.
4. QUESTION WHETHER A THING IS A NUISANCE MUST BE SETTLED AS A QUESTION OF FACT, AND NOT OF LAW. *Id.*
5. PUBLIC PICNICS AND DANCES ARE NOT IN THEIR NATURE NUISANCES; and an ordinance declaring them to be nuisances is void. *Id.*

OFFICE AND OFFICERS.

PRESUMPTION THAT OFFICER HAS DONE HIS DUTY applies in favor of a warrant issued on the state treasury, and if the warrant was improperly issued, that fact must be shown in order to overcome such presumption. *Nat. Bank v. Herold*, 476.

See BONDS, 1; MUNICIPAL CORPORATIONS, 14-16.

PARTNERSHIP.

1. RIGHT TO ACT AS PARTNER IS EXTINGUISHED by renouncing the partnership and opposing it. A party who so repudiates his contract of partnership has no interest or right to share in a judgment obtained by the other partner, especially where he actively assists the party against whom the recovery was had in opposing the claim. *Miller v. Chambers*, 675.
2. CONVEYANCE OF LAND TO PERSONS WHO ARE AT THE TIME PARTNERS, AND DESCRIBING THEM IN THE DEED AS COMPOSING THE FIRM OF A & Co., does not make the land partnership property, nor afford any indication that it was purchased with partnership funds or for partnership purposes. *Alkire v. Kahle*, 540.
3. TO MAKE LAND PARTNERSHIP PROPERTY, it must have been purchased with partnership funds for partnership purposes, or at least there must have been one of such elements present. A court is not justified in finding that real property, which was conveyed to two partners, became partnership property when it does not appear to have been used in the business of the partnership, or to have been paid for out of its funds, although

the partners, in testifying about such property, designate it as partnership assets. *Id.*

4. AGENCY. — WHEN AUTHORITY AS AGENT IS CONFERRED UPON PARTNERSHIP, EACH PARTNER MAY EXECUTE, and the act of one is the act of the firm, and in strict pursuance of the power. *Deakin v. Underwood*, 827.
5. ID. — WHERE POWER TO EXECUTE CONTRACT IS GIVEN TO FIRM, PRINCIPAL IS BOUND, although the member of the firm who signs the principal's name adds his own individual name, instead of the name of the firm, as agent. And if the agent simply fixed to the instrument the name of his principal alone, the latter would be effectually bound. *Id.*

PERPETUITIES.

See WILLS.

PLEADING AND PRACTICE.

1. JURISDICTION — EQUITY. — It matters not under the code of Indiana what the form of the action, if the facts stated sustain the theory on which the complaint proceeds, the plaintiff is entitled to the relief he seeks even if equitable relief be demanded. *Blair v. Smith*, 593.
2. PLAINTIFF CANNOT SPLIT UP SINGLE CAUSE OF ACTION into two or more suits, and if he does so, and recovers part of his demand, this is a waiver of and bar to the residue of his claim. *Liddell v. Chidester*, 387.
3. PLEADING SHOULD STATE FACTS, and the averments of legal conclusions, drawn from the facts stated, are in no way necessary to the full presentation of the right claimed, and are properly stricken out on motion. *Morrison v. Insurance Co.*, 63.
4. ALL REASONABLE INTENDMENTS WILL BE INDULGED IN FAVOR OF PLEADING EXCEPTED TO, when the exceptions, though special in form, are but an amplification of the general demurrer, and fail to point out specific defects. *Stone v. Day*, 17.
5. IT IS NOT ERROR TO OVERRULE EXCEPTION TO PETITION based on the ground that the exhibits filed therewith contradict the allegations, where, although the petition refers to exhibits as having been made parts thereof, it appears from an inspection of the transcript that no such exhibits are contained in the record. *Bynum v. Preston*, 49.
6. INSERTION OF WRONG NAME IN ANSWER IS IMMATERIAL ERROR, where, taking the answer altogether, it is perfectly apparent that the insertion of such name was a clerical error, and the name intended is obvious. *Fears v. Albea*, 78.
7. RIGHT TO OBJECT TO RULING OF COURT ON DEMURRER IS WAIVED by amending the declaration and going to trial on the merits. *Darracott v. Chesapeake etc. R. R. Co.*, 266.
8. APPEAL. — RULINGS AND JUDGMENT OF TRIAL COURT ARE PRESUMED CORRECT, in the absence of positive error appearing in the abstract. *Dowagiac M. Co. v. Gibson*, 697.
9. DISMISSAL AFTER NEW TRIAL GRANTED. — After trial of action, and verdict for plaintiff set aside on motion of the defendant, and a new trial granted, the plaintiff has the same right to dismiss or discontinue as if no trial had ever been had. And after such dismissal or discontinuance, he may bring another action for the same cause of action, and is not estopped from alleging other or different facts from those alleged in the first action. *Phelps v. Winona etc. R. R. Co.*, 867.

10. **EFFECTIVE PART OF PLEA OF ANOTHER ACTION PENDING** is, that the action is still pending, and this must be affirmatively proved. *Id.*
11. **ON APPEAL, FINDING OF FACTS WILL NOT BE DISTURBED** if there is any evidence which, fairly considered, will support it; such finding, made by the court in action tried before it, has the force and effect of a verdict of the jury. *Swayne v. Waldo*, 712.
12. **FINDING OF JURY WILL NOT BE REVIEWED** if there is any evidence to support it. *Reiley v. Hayes*, 737.
13. **APPEAL. — SUPREME COURT WILL NOT INTERFERE WITH FINDING** upon ground that evidence does not support action of trial court in permitting sheriff to amend return. *Jeffries v. Rudloff*, 653.
14. **ERROR MUST AFFIRMATIVELY APPEAR OF RECORD.** The supreme court cannot presume error or pass upon question not so appearing of record. *Id.*
15. **VERDICT WILL NOT BE DISTURBED** where the record shows that the questions in issue were fairly presented upon the trial, that substantial justice has been done, and it also appears that the instructions of the court and the general verdict are characterized by an absence of passion and prejudice, unless there are such grave and material errors as absolutely compel a reversal. *Atchison etc. R. R. Co. v. Sadler*, 729.
16. **VARIANCE BETWEEN ALLEGATION AND PROOF IS NOT MATERIAL** unless it misleads the adverse party to his prejudice. *Deakin v. Underwood*, 827.
17. **ARGUMENT OUTSIDE OF RECORD**, about matters wholly foreign to the case on trial, and without any support in evidence, and calculated to operate prejudicially to defendant upon the minds of the jury, if allowed by the court under objection, is error sufficient to reverse the judgment. *Tillery v. State*, 882.
18. **PLEADER WHO REFERS TO A STATUTE WHEN NONE EXISTS**, or when the statute referred to does not entitle him to any relief on the facts stated, may nevertheless recover, if the facts as alleged and established are sufficient to entitle him to recover at common law. In such cases the reference to the statute may be regarded as surplusage. *Chicago & A. R. R. Co. v. Dillon*, 559.
19. **MANNER OF CONDUCTING ORAL ARGUMENT BEFORE A JURY** is so much within the discretion of the trial court that the appellate court will not review its action unless manifest injustice has been done. *Chicago etc. R. R. Co. v. Pillsbury*, 483.
20. **INSTRUCTION MUST BE TAKEN AS AN ENTIRETY**, and in connection with the others of the series referring to the same subject and immediately connected with it; and if, when so taken together, such instructions express the law, they afford no just ground of complaint, even though an isolated and detached clause is, in itself, an inaccurate or incomplete statement of the law. *Indianapolis etc. R'y Co. v. Watson*, 578.
21. **ALTHOUGH INSTRUCTION IS NOT ENTIRELY PLAIN OR UNAMBIGUOUS**, yet if the rule of law attempted to be stated is made clear by the instruction immediately following, there is no ground for reversal. *Sweeney v. Merrill*, 734.
22. **ERRONEOUS CHARGE. — WHERE CORRECT RULE IS BRIEFLY STATED** in the beginning of a charge, but is afterwards overruled and changed, and an incorrect rule substituted and impressed upon the jury, so as to probably influence it, the whole charge is error. *Parker v. Hull*, 224.
23. **INSTRUCTIONS AFFORD NO GROUND OF COMPLAINT**, where, taking them all together, they so fairly present the question involved that the jury could

- not be misled, although some of the instructions may by themselves be subject to criticism. *Atchison etc. R. R. Co. v. Sadler*, 729.
24. INSTRUCTIONS MUST ALWAYS BE CONSTRUED IN THE LIGHT OF THE ISSUES on trial, and the evidence offered in their support. *Chicago etc. R. R. Co. v. Dillon*, 559.
 25. EVIDENCE. — WHERE GENERAL OBJECTION ONLY IS RAISED TO INTRODUCTION OF RECORD COPY OF DEED conveying land, which copy would have been admissible under certain circumstances, such objection is not available for the purposes of error. *Smith v. Leighton*, 778.
 26. IF TESTIMONY ESTABLISHES TRUTH OF MATERIAL AVERMENTS IN PLEA, on which the plaintiff took issue, without objection, the defendant is entitled to a verdict, whether the plea was sufficient or not. *Alabama G. S. R. R. Co. v. Arnold*, 354.
 27. ERRONEOUS EXCLUSION OF EVIDENCE FROM JURY IS NOT GROUND FOR REVERSAL of the judgment, where it manifestly appears from the whole case that the evidence, if admitted, could not have influenced the verdict. *Alsop v. Jordan*, 53.
 28. EXCLUSION OF TESTIMONY, ADMISSION OF WHICH COULD NOT HAVE AFFECTED RESULT, is not ground for reversal of a decree. *Rorer Iron Co. v. Trout*, 285.
 29. ADMISSION OF INADMISSIBLE DECLARATION, which does not effect any substantial right of defendant, is not ground for reversal. *Oshkosh G. L. Co. v. Germania F. I. Co.*, 233.
 30. EVIDENCE.—TESTIMONY IMPROPERLY ADMITTED IN PROOF OF FACT IS HARMLESS ERROR, if the same fact was proved by other evidence which was competent and uncontradicted. *Burnett v. Vincent*, 98.
 31. ORDER MADE AT THE INSTANCE OR TO PROMOTE THE INTEREST of appellant will not be reviewed on an appeal taken by him. *Estate of Radovich*, 466.
 32. TO DENY CONTINUANCE, ON MOTION TO DISSOLVE INJUNCTION RESTRAINING SALE, IS ERROR, where the motion for such continuance is made by the complainant to enable him to complete his proofs, and is supported by an affidavit to the effect that he has additional and material evidence to take in the case, which will show that the notice of sale is defective, and which, up to this time, he has been unable to take, although he has used due diligence in perfecting his proofs. *Vaught v. Rider*, 305.
- See ATTACHMENT AND GARNISHMENT; ATTORNEYS AT LAW; BANKRUPTCY AND INSOLVENCY, 3; EJECTMENT; MARRIAGE AND DIVORCE, 3; STATUTES; TENDER; TRESPASS.

PLEDGE.

1. LIEN OF PLEDGEE IS EXTINGUISHED BY A VALID TENDER to him of the amount due and his refusal to accept it. *Loughborough v. McNevin*, 435.
2. PLEDGEE IS GUILTY OF CONVERSION IF HE DECLINES TO ACCEPT A VALID TENDER of the amount due him, and thereafter refuses a demand made on him to surrender the pledged property to the person entitled thereto. This conversion, being wrongful, extinguishes the pledgee's lien. *Id.*
3. TENDER OF AMOUNT DUE PLEDGEE IS NOT VITIATED by a demand made at the same time for the surrender of the pledged property. *Id.*
4. TENDER OF AMOUNT DUE PLEDGEE MAY, under the Civil Code of California, be made after the debt becomes due, although demand for the payment

of the debt has been before made and refused, if accompanied with an offer to pay the interest which has accrued. *Id.*

5. **REFUSAL TO DELIVER PLEDGED STOCK TO THE PLEDGOR'S ASSIGNEE IS NOT JUSTIFIED BY ITS ATTACHMENT** under a writ against such pledgor, subsequent to such assignment. *Id.*
6. **PLEDGEE IS ANSWERABLE FOR DEPRECIATION IN VALUE OF PLEDGED PROPERTY** after he has refused to accept a valid tender of the debt, and a demand for the possession of the property; and this is equally true whether an action is brought against him as for a conversion, or a bill is filed against him to redeem from the pledge. *Id.*
7. **TROVER IS THE USUAL ACTION TO ENFORCE A REDEMPTION OF A PLEDGE.** *Id.*
8. **INTERVENTION. — ASSIGNEE PENDENTE LITE FROM ONE OF THE DEFENDANTS** of the latter's interest in pledged stocks, and of his claim for damages for their conversion, — the suit being to foreclose the pledgee's lien, — may be allowed to intervene for the purpose of asserting such interest and claim for his own benefit. *Id.*

PROCESS.

1. **WHERE SERVICE OF PROCESS IS PROCURED BY FRAUD, THAT FACT MAY BE SHOWN**, and the court will refuse to exercise its jurisdiction, and turn the plaintiff out of court. The law will not lend its sanction or support to an act, otherwise lawful, which is accomplished by unlawful means. The facts disclosing the fraud may be set up by answer. *Chubbuck v. Cleveland*, 864.
2. **APPEARANCE BY ANSWER, WHICH SIMPLY PROTESTS AGAINST THE EXERCISE OF JURISDICTION, AND CLAIMS NO OTHER RIGHT, IS NOT SUCH AN APPEARANCE AS WAIVES THE OBJECTION.** *Id.*
3. **SIGNATURE TO SUMMONS IN CIVIL ACTION NEED NOT BE IN HANDWRITING** of the plaintiff or his attorney. Any signature, whether written, printed, or lithographed, which the party issuing the summons may adopt as his own, will be sufficient. *Herrick v. Morrill*, 841.

See CONTEMPT; JUDGMENTS; JURISDICTION.

PUBLIC POLICY.

See CONTRACTS, 9, 10.

RAILROADS.

1. **CONSTRUCTION. — CONTRACT BETWEEN TWO RAILROAD COMPANIES**, whereby one stipulates that the other shall have "the perpetual and free use of the right of way," within a distance specified, where the track of one company crosses the other, confers the use of the right of way free from pecuniary compensation, and not merely uninterrupted use. *Id.*
2. **CROSSING. — ALABAMA STATUTE (REV. CODE, 1867, SECS. 1417-1439), AUTHORIZING AND REGULATING INDORSEMENT OF RAILROAD BONDS BY THE STATE, AND SECURING TO THE STATE ITS PRIORITY OF LIEN, MAKES A RESERVATION OF THE RIGHT OF WAY FOR CROSSING AND UNION PURPOSES:** *Id.*, sec. 1435; and this provision is an implied stipulation in every mortgage executed under the law, and is as binding on all parties concerned as if it had been specially incorporated in the contract. *Id.*
3. **PROVISION OF ALABAMA REV. CODE, SEC. 1435, THAT RAILROAD COMPANIES "may construct their roads so as to cross each other, if necessary,"**

does not limit the right of crossing to an intersection at right angles. It would be a strict and unreasonable construction to hold that no discretion should be allowed in regulating such an arrangement, since the power to do an act means the power to do it in a mode that is just, reasonable, and satisfactory, taking into consideration the peculiar circumstances of each case. *Alabama G. S. R. R. Co. v. South and N. R. R. Co.*, 401.

4. **GRANT OF FRANCHISE TO BY CITY AS AGENT OF STATE.** — A railroad company was authorized under its original charter, granted by the legislature, to construct its road across or through any street or highway, subject to the limitation that the public use of such street or highway should not be unnecessarily impaired. An amendment to this charter authorized any incorporated city or village within the state, and situated upon the line of the company's road, to grant to the company any rights, privileges, or franchises having reference to the construction and management of its road, and the conduct of its business, within the limits of such city. Under the authority thus conferred in the charter of the company, a grant to it by a city, in the form of an ordinance, of the right to construct a track with necessary sidings and turn-outs through a business street in said city, in such manner as the company might deem necessary for its business purposes, is an irrevocable franchise, protected from impairment by both federal and state constitutions, and subject to the limitation only that the use of the street by the public should not be unnecessarily or materially impaired. *Mobile v. Railroad*, 342.
5. **PRIVILEGE GRANTED TO A RAILROAD COMPANY TO LAY ITS TRACK THROUGH BUSINESS STREET OF CITY**, with the necessary sidings and turn-outs, these to be laid in such manner as the company might deem expedient and necessary for its business, is none the less a franchise, in the proper sense of that term, because it was granted, not directly by legislative enactment, but by the city authorities, under the sanction of the company's charter, itself granted by the legislature. For this purpose the city is regarded as a political agent for the state, and an act done by the state through its duly authorized agent is an act done by the state itself. *Id.*
6. **RIGHT GRANTED TO RAILROAD COMPANY TO LAY ITS TRACK THROUGH CITY STREET NECESSARILY IMPLIES** the right to use such track in the mode ordinarily adopted by railroad companies, subject to reasonable regulation under the police power of the proper authorities. The right to lay side-tracks and turn-outs in like manner implies the right to use them, and this includes their use for the transportation of goods to and from adjoining stores and warehouses. *Id.*
7. **CITY ORDINANCE HAVING FOR ITS OBVIOUS PURPOSE** the destruction of an irrevocable franchise belonging to a railroad company, no question of police power, abatement of nuisance, or regulation of an admitted right being involved in the case, is void. *Id.*
8. **RAILROAD COMPANY IS ANSWERABLE FOR ACTS OF ITS SERVANTS** in the course of their employment, whether abusing or rightfully pursuing the powers conferred on them, and whether acting within or in direct violation of their instructions. *Lake Shore etc. R. R. Co. v. Brown*, 511.
9. **NOTICE OF THE APPROACH OF RAILWAY TRAINS SHOULD BE GIVEN** by those in charge of them, at all points of known or apprehended danger. *Chicago & A. R. R. v. Dillon*, 559.

10. **IN ACTION TO RECOVER FOR INJURIES SUSTAINED FROM NEGLIGENCE OF SERVANTS OF RAILROAD IN NOT GIVING WARNING OF THE APPROACH OF A TRAIN** to a public crossing, it is not necessary to show that the avenue there crossed was a public highway, within the meaning of the statute requiring bells to be rung or whistles blown when approaching such highways, for, independent of such statute, it is the duty of persons having charge of trains to give notice of their approach at all points of known or reasonably apprehended danger. *Id.*
11. **NEGLIGENCE. — IF THE VIEW OF A TRAVELER ON THE HIGHWAY APPROACHING A RAILROAD CROSSING** is so obstructed that he cannot see an approaching train in time to stop his team before colliding with it, if he knows that a train is due at such crossing, at or about such time, and if he is unable to hear the approaching train when his team is in motion, whether by reason of the force and direction of the wind or of noises in the vicinity, whether made by his own wagon or by other causes, ordinary care requires him to stop his team while he may do so, and listen for the train. *Seefeld v. Chicago etc. R. R. Co.*, 168.
12. **WHERE ANIMAL IS WRONGFULLY ON TRACK OF RAILROAD COMPANY**, without the fault of the company, those in charge of its trains owe no duty to look ahead and ascertain if the animal be there, and are only bound to exercise care in respect to it from the time they discover its peril. This rule is equally applicable in the case of an animal wrongfully upon a highway at a railroad crossing. *Palmer v. Northern P. R. R. Co.*, 839.
13. **OPINION OF WITNESS.**—Witness who states that he was at a railroad crossing at the time of an accident, and that he did not hear any bell or whistle, may be asked whether, in his opinion, he would have heard the bell had it been rung, or the whistle had it been blown. *Chicago & A. R. R. Co. v. Dillon*, 559.
14. **ALTHOUGH, IN ABSENCE OF STATUTORY REQUIREMENT, IT MAY NOT BE DUTY** of railroad company to erect a ticket-office and depot at a station on its road, yet, having done so, and thereby invited persons having business with it to enter for its transaction, the law requires that the building shall be adapted to the purpose, and that the approaches thereto shall not be unsafe. But the duty of the company to maintain a light at its depot in the night-time is limited to the arrival and departure of trains, and for a sufficient time before and after to enable persons to enter cars or alight therefrom, without undue haste, so as to secure safety. *Alabama G. S. R. R. Co. v. Arnold*, 354.
15. **RAILROAD COMPANY IS TO BE REGARDED AS FREE FROM BLAME**, when, in the administration of its affairs, it conforms to the rules generally in use by other prudently conducted companies, unless it violates or disregards some positive requirement of the law, and thereby inflicts an injury. *Id.*
16. **NEGLIGENCE — BURDEN OF PROOF. — IN ACTION AGAINST RAILWAY COMPANY TO RECOVER DAMAGES FOR PROPERTY DESTROYED BY FIRE**, caused by sparks emitted from the company's engine, which ignited the dry grass on the right of way, the fire thence spreading to the property destroyed, the burden of proof is on the railway company to show that there was no negligence on its part in causing the fire. But this demand of the law as to burden of proof is satisfied when the company shows that it was using on the engine, at the time of the fire, the best mechanical appliances to secure safety from fire, that they were in good repair, and

were operated by a skillful engineer in a careful manner. *Gulf etc. Ry Co. v. Benson*, 74.

17. **ID.** — ALTHOUGH RAILWAY COMPANY MAY ABSOLVE ITSELF FROM LIABILITY on account of the presumed negligence arising from the mere fact that fire caught from sparks emitted from its engine, by showing that its engine and spark-arrester were the best in use, yet, if the fire caught on its own right of way in dry grass which it allowed to accumulate, it is a question of fact for the jury to determine whether the failure to remove the inflammable matter was negligence. *Id.*
18. **RAILROAD COMPANY CANNOT EVADE ITS LEGAL LIABILITY FOR INJURIES CAUSED BY NEGLIGENT OPERATION** of its road by voluntarily conveying and surrendering indefinitely to mortgage trustees of its own selection its road and franchises, where there is no statutory provision authorizing or regulating the transfer and surrender. *Naglee v. Alexandria etc. Ry Co.*, 308.

See **COMMON CARRIERS**; **CONTRACTS**, 7, 8; **COVENANTS**, 1; **EMINENT DOMAIN**; **INJUNCTIONS**, 1-3; **MASTER AND SERVANT**; **MUNICIPAL CORPORATIONS**, 18.

RAPE.

See **CRIMINAL LAW**, 47-51.

RECEIVERS.

1. **PRACTICE.** — RECEIVER OF INSOLVENT CORPORATION HAS RIGHT TO RECONVENE AGAINST ONE WHO INTERVENES in a proceeding to which he is a party, and it is proper to allow him to set up all the rights of the corporation growing out of a continued course of dealing with the intervenor under one general agreement. And the fact that other suits were pending in another tribunal involving the subject of dispute, and to which the receiver was a party, when pleaded in abatement of the plea in reconvention, is not an answer to it. *Continental Nat. Bank v. Weems*, 85.
2. **ASSETS OF ESTATE OF DECEDENT MAY BE CALLED IN FROM HANDS OF PERSONAL REPRESENTATIVE** and placed in the hands of a receiver by a court of equity, especially in a creditor's suit. *Davis v. Chapman*, 251.

REGISTRATION.

REGISTRATION. — OBJECT OF RECORDING DEED IS TO GIVE NOTICE TO CREDITORS and subsequent purchasers from the grantor of the grantee's title, and, except as to the matter of notice, an unrecorded title is as good as if recorded. *Evans v. Templeton*, 17.

See **BONA FIDE PURCHASERS**, 4.

REPLEVIN.

1. **REPLEVIN BY MORTGAGEE.** — LEVY OF EXECUTION ON PROPERTY SUBJECT TO CHATTEL MORTGAGE gives officer no greater rights therein than mortgagor himself had; and the mortgagee, upon default of payment of the debt, is entitled to possession of the property, and upon demand for such possession on the officer, may bring his action to recover the same. *Rankine v. Greer*, 751.
2. **IT IS NO DEFENSE IN ACTION BY MORTGAGEE AGAINST OFFICER**, to recover mortgaged property held under levy of execution, to show that,

at the time demand was made on the officer for possession, there was a prior outstanding mortgage held by another person against the same property. *Id.*

3. REPLEVIN MAY BE MAINTAINED AGAINST SHERIFF who holds property by virtue of a writ in another action of replevin then pending and undetermined, and also against the plaintiff in such suit, where the plaintiff in the latter suit is not a party to the first. *Reiley v. Hayes*, 737.

SALES.

1. KNOWLEDGE THAT WARRANTY WAS FALSE NEED NOT BE SHOWN. — If an article is warranted to be of a certain character, and this is shown to be false, the party injured may recover damages for breach of warranty without showing that party making the warranty knew it to be false. *Swayne v. Waldo*, 712.
2. RESCISSION OF CONTRACT. — WHERE PARTIAL PERFORMANCE consists in the payment by defendant of an indebtedness on goods delivered to him as a consideration for the transfer to plaintiff of certain lands, the latter cannot rescind, if he does not offer to repay defendant the money so paid out by him, but must keep the land, and is entitled to recover the difference between the contract price and what it is worth. *Id.*
3. ALTHOUGH CONTRACT OF SALE IS IN WRITING, PAROL EVIDENCE OF FRAUD AND MISREPRESENTATIONS IS ADMISSIBLE TO DEFEAT RECOVERY when pleaded as a counterclaim to action on note given for the purchase price. The fact that the fraud and misrepresentations were made before the contract and note were executed does not prevent showing that they were inducements to the purchase, and that the vendee thereby sustained loss and damage. *Dowagiac M. Co. v. Gibson*, 697.
4. QUESTION OF VENDEE'S WAIVER OF RIGHT TO DEFEND ON GROUND OF FRAUD IS PROPERLY SUBMITTED TO THE JURY, where vendee had knowledge of the fraud prior to execution of written contract of sale, and thereafter executes note for purchase price, if there is some evidence tending to rebut the presumption that the note was a settlement of the claim for damages arising from the fraud. *Id.*
5. VENDOR'S FRAUD IS GROUND OF RECOVERY IN COUNTERCLAIM to action for purchase price of goods sold, although there is an absence of proof of warranty. *Id.*

See CONTRACTS, 14-16.

SET-OFF.

See COUNTERCLAIM.

SHERIFFS.

See ATTACHMENT AND GARNISHMENT; EXECUTIONS; REPLEVIN.

SLANDER.

1. DEFENDANT IN ACTION FOR SLANDER MAY NOT SHOW IN MITIGATION circumstances not known to him when he spoke the words complained of. *Barkly v. Copeland*, 413.
2. EVIDENCE OF THE WEALTH OF DEFENDANT IS ADMISSIBLE IN ACTION AGAINST HIM FOR SLANDER, to show the extent of the injury suffered from his defamatory words, and when punitive damages are allowed, to graduate the punishment. *Id.*

3. **EVIDENCE OF OTHER CRIME.** — IN ACTION FOR SLANDERING plaintiff by charging him with stealing the cattle of P., a witness may be permitted to detail a conversation between him and plaintiff, in which the latter made an effort to induce the former to steal the cattle of D., if the witness states that there was a general understanding between him and plaintiff, under which he was to steal cattle and drive them to plaintiff to be butchered for their joint benefit. *Id.*

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE OF PAROL EXECUTORY CONTRACT FOR ASSIGNMENT OF PATENT RIGHT** may be enforced; a parol assignment is valid, and is not forbidden by section 4898 of the Revised Statutes of the United States, which provides that patents "shall be assignable in law by an instrument in writing." *Searle v. Hill*, 688.
2. **FRAUD IN OBTAINING A CONTRACT WILL DEFEAT THE RIGHT TO COMPEL A SPECIFIC PERFORMANCE THEREOF**, although the fraud was not productive of injury to the defendant. It is sufficient that it would result in an injury to third persons, as where one by fraudulent representations procured a contract for the sale of lands to him, which contract, but for such representations, would have been given to another. *Kelly v. Cent. Pac. R. R. Co.*, 470.
3. **FRAUD WILL DEFEAT A SUIT FOR SPECIFIC PERFORMANCE** of contract to convey lands, though such fraud was not productive of damage to the vendor or to third persons, if by the fraud the vendor was deceived and caused to enter into a contract to which his assent could not have been otherwise obtained. *Id.*
4. **SPECIFIC PERFORMANCE WILL NOT BE DECREED UNLESS THE CONTRACT IS FREE FROM EVERY IMPUTATION OF FRAUD OR DECEIT.** The contract of the party seeking specific performance must be free from all blame. *Id.*

STATUTES.

PROVISIONS OF PUBLIC STATUTE UNDER WHICH PARTY RESTS HIS RIGHT TO RECOVER need not be pleaded, unless the statute gives a cumulative remedy, in which event the pleader should show which remedy he intends to assert. *Chicago and Alton R. R. Co. v. Dillon*, 559.

STATUTE OF FRAUDS.

1. **ESTOPPEL.** — NOTWITHSTANDING REQUIREMENTS OF STATUTE OF FRAUDS, declaring void certain contracts for the sale of land unless evidenced by writing, and subscribed by the party to be charged, yet an equitable interest may be acquired in lands, without any written transfer of title, by conduct or declarations of the owner which would create an estoppel *in pais* on his part; and this rule applies as well to corporations as to natural persons. *Alabama G. S. R. R. Co. v. South & N. R. R. Co.*, 401.
2. **VERBAL DIRECTION AS FOLLOWS:** "You give all the goods to H. and R. that they want, and charge directly to them, and every first of the month you bring in the bill, and I will pay it," uncontrolled and unqualified by other circumstances, imports on its face an original, and not a collateral, promise, implying that the credit was to be given exclusively to the promisor, although the goods were to be delivered to H. and R., and is not therefore within the statute of frauds. *Maurin v. Fogelberg*, 814.

3. **VERBAL CONTRACT FOR PURCHASE OF LAND, NEVER REDUCED TO WRITING**, nor accompanied by a payment of any part of the purchase-money, is void under the statute of frauds, and confers no rights prejudicial to either party to an ejectment suit for the land. *Williams v. Gibson*, 369.

See AGENCY, 1, 2.

STATUTE OF LIMITATIONS.

1. **AFTER AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS**, it is competent for the assignor to make a new promise in writing to pay, which will have the effect to revive the debt, thus removing the bar of the statute and binding the assignee, and the other creditors have no ground to complain. *Hellman v. Kiene*, 693.
2. **UNDER TEXAS REVISED STATUTES, ARTICLE 3222, TIME LIMITED FOR COMMENCEMENT OF CERTAIN ACTIONS DOES NOT BEGIN TO RUN** against married women until the removal of the disability of coverture; and a married woman should not be denied the benefit of this provision, because the courts recognize her right to maintain actions for the protection of exempt property, when necessary, to enable her to protect herself against the acts of her husband and others. *Alsop v. Jordan*, 53.

See ADVERSE POSSESSION; EASEMENTS, 1, 2.

SUBROGATION.

SUBROGATION. — **THIRD PARTY IS ENTITLED TO BE SUBROGATED TO RIGHTS OF CREDITOR**, where, having an interest in the debt, he pays it in pursuance of an agreement between himself and the debtor, although the debt was not at the time due. *Fears v. Albea*, 78.

SURETYSHIP.

PERSONAL DECREE AGAINST SURETY ON BOND OF PURCHASER AT JUDICIAL SALE IS VOID, where it is rendered upon a rule against him and his surety, upon the latter's failure to pay. *Anthony v. Kasey*, 277.

See ATTORNEYS AT LAW; GUARDIAN AND WARD, 2, 3.

TAXATION.

1. **PROPER CERTIFICATE OF SALE IS ESSENTIAL TO COMPLETE SALE OF LAND FOR TAXES**, and such certificate must be executed at the time of the sale, or within such time thereafter as may be reasonably necessary for the purpose; and one not executed until years after the sale is of no effect. *Gilfillan v. Chatterton*, 810.
2. **TAX LIEN IS NOT DESTROYED NOR TAXES INVALIDATED** by the method in which the owner's name is entered on the tax duplicate, especially where such error or inaccuracy is slight. *Eads v. Retherford*, 611.
3. **EQUITY WILL NOT RELIEVE AGAINST AN ASSESSMENT OF PROPERTY FOR THE PURPOSES OF TAXATION**, on the ground that such assessment is too high, when the excess, if any exists, resulted from an honest error of judgment on the part of the assessor. In such cases the party aggrieved must resort to the remedy provided by statute. If he omits to do so at the proper time and place, his remedy is lost. *Buttenuth v. St. Louis B. Co.*, 545.
4. **EQUITY WILL RELIEVE AGAINST AN ASSESSMENT FRAUDULENT IN FACT OR IN LAW.** *Id.*

5. **IN ASSESSING FOR PURPOSES OF TAXATION A BRIDGE WHICH EXTENDS ACROSS A RIVER CONSTITUTING THE BOUNDARY BETWEEN TWO STATES,** each state may assess and tax so much of such bridge as does not stand beyond the "thread," or "middle of the main channel," of such river. *Id.*
6. **STATE CANNOT LEVY A TAX ON FOREIGN CORPORATIONS DOING BUSINESS THEREIN,** if its constitution prohibits it from levying a like tax on its inhabitants. *San Francisco v. Liverpool etc. Ins. Co.*, 425.
7. **THE IMPOSITION OF A TAX FORBIDDEN BY THE CONSTITUTION CANNOT BE SUPPORTED AS AN EXERCISE OF THE POLICE POWER OF THE STATE.** *Id.*
8. **WHAT IS A TAX.** — If a statute requires every agent of a foreign insurance company doing business in this state to pay into the treasury of the county a sum equal to one per centum of the amount of all premiums paid or agreed to be paid to such agent for insurance effected by him within such county, the money when paid to constitute a fund to be known as the firemen's relief fund of such county, such exaction is a tax, and, as such, is forbidden by section 12 of article 11 of the constitution of California, declaring that the legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes. *Id.*

See CO-TENANCY; MORTGAGES, 13, 14.

TELEGRAPHS.

1. **LIABILITY OF TELEGRAPH COMPANY FOR NEGLIGENCE — AGENCY.** — **UNDISCLOSED PRINCIPAL MAY SUE** in his own name on contract made by agent, and is entitled to all its advantages and benefits. The fact that a telegraph company only contracted with the agent in sending a telegram, and had no knowledge that the plaintiff was in fact principal, is immaterial, except that it might set up as a defense any matters which occurred prior to disclosure of the principal which would constitute a defense in a suit by the agent. *Harkness v. W. U. Tel. Co.*, 672.
2. **NEGLECT IN DELIVERING TELEGRAM.** — **BURDEN OF PROOF** is upon telegraph company to explain delay in not delivering message until three days after its agent receives same; and where no excuse is offered for the delay, the court is justified in finding that the company was negligent. *Id.*
3. **WHILE TELEGRAPH COMPANY MAY RESTRICT ITS LIABILITY,** IT CANNOT CONTRACT against its own negligence in failing to transmit and deliver messages, nor limit a recovery for damages thereby sustained. *Id.*
4. **TELEGRAPH COMPANY MAY NOT LIMIT ITS LIABILITY** so as to relieve itself against its own gross negligence by making a provision in its contract with the sender of a message that it will not be liable for unrepeatd messages happening by negligence of its servants beyond the amount received for sending the same, and this rule does not make the company an insurer. *Western U. Tel. Co. v. Crall*, 795.
5. **MISTAKE IN SENDING TELEGRAM — BURDEN OF PROOF.** — Where no testimony is introduced by the defendant company, the mere production of the message containing the mistakes is sufficient to establish gross carelessness by the company, and would throw upon it the burden of proof to excuse or explain its mistakes. *Id.*

TENDER.

PLEA OF TENDER IS SUFFICIENT THOUGH THE MONEY IS NOT BROUGHT INTO COURT. *Loughborough v. McNevin*, 435.

See PLEDGE.

TIME.

See CONTRACTS, 5; VENDOR AND VENDEE, 2.

TRESPASS.

EQUITY — PLEADING. — IN ACTION OF TRESPASS TO TRY TITLE, IF DEFENDANT HAS EQUITIES which entitle him to require the plaintiff to pay his debt before recovering the property, he should set them up in his answer; and he is not entitled to such affirmative relief under the plea of not guilty. *Fuller v. O'Neal*, 59.

See INJUNCTIONS, 2.

TROVER.

See PLEDGE, 7.

TRUSTS AND TRUSTEES.

1. **SALE OF LAND BY AGENT OF TRUSTEE PASSES NO TITLE TO PURCHASER** when there is nothing on the face of the trust deed authorizing the trustee to appoint an agent to make the sale for him. *Fuller v. O'Neal*, 59.
2. **OFFICE OF TRUSTEE IS ONE OF PERSONAL CONFIDENCE**, and cannot be delegated, unless authority so to do is expressly granted in the instrument from which he derives his powers. A trustee empowered to sell on non-payment of the debt to secure which the trust is created can no more absent himself while the sale is going on than he can make it at a time or place or for a character of consideration different from that authorized in the deed of trust. *Id.*
3. **ONE WHO RECEIVES MONEY OF ANOTHER IN FIDUCIARY CAPACITY, AND EXPENDS IT** in payment of his own debts, does not thereby create a lien upon his entire estate for its repayment, but the trust estate must be clearly traced into specific property, in order that the *cestui que trust* may claim either the property itself or a lien upon it. *Continental Nat. Bank v. Weems*, 85.
4. **WHEN TRUSTEE MINGLES TRUST MONEY WITH HIS OWN, AND AFTERWARDS PAYS OUT** to others, he is presumed to pay out his own money, so long as he retains sufficient to cover the trust fund. *Id.*

See BANKS AND BANKING, 1, 2.

USURY.

LOAN OF MONEY TO DEBTOR TO PAY USURIOUS DEBT WITH is not affected with the illegality in the usurious loan, where the security for that loan is satisfied and extinguished, and that for the new loan is given upon a new consideration, and is a wholly different and distinct obligation, even though the lender knows that the original loan was usurious and is aware of the borrower's object in obtaining the new loan. *Vaught v. Rider*, 305.

VENDOR AND VENDEE.

1. **CONTRACT FOR THE SALE OF LAND MUST BIND BOTH PARTIES** or it can bind neither. *Atlee v. Bartholomew*, 103.
 2. **TIME IS NOT OF THE ESSENCE OF A CONTRACT FOR THE SALE OF LAND** when such contract is simply an agreement to convey upon the payment of a certain amount at a specified time; and a conveyance of the title may be decreed upon the tender of the price and interest within a reasonable time. Where time is not stated as of the essence, courts are reluctant to enforce forfeitures. *Sanford v. Weeks*, 748.
 3. **IT IS INCUMBENT UPON OBLIGOR IN CONTRACT FOR SALE OF LAND**, who seeks to avoid performance under a provision in the contract authorizing him to declare it void "if the title cannot be made good," to prove affirmatively that fact. If the defect alleged is a sale of the land for taxes, it is incumbent upon him to prove that the period for redemption has expired. *Deakin v. Underwood*, 827.
 4. **FACTS INSUFFICIENT TO STOP VENDEES OF LAND FROM CLAIMING TITLE THERETO.** — The vendees of land executed notes for the purchase-money, but neither in the deed to them nor in the notes was a lien reserved for their payment. A small part only of the purchase-money was paid, and the vendees afterwards left the land, and the vendor resumed possession. After the purchase-money notes were barred by limitation, the vendor brought suit against the vendees, alleging their abandonment of the land, and praying a cancellation of the deed as a cloud upon his title. *Held*, that the defendants were not estopped by these facts from setting up their legal title to the land in controversy. *Bynum v. Preston*, 49.
- See **ADVERSE POSSESSION; AGENCY; BONA FIDE PURCHASERS; GROWING CROPS, 2; MECHANICS' LIENS, 2; STATUTE OF FRAUDS, 3.**

WATERS.

See **BOUNDARIES; EASEMENTS.**

WAYS.

See **HOMESTEADS, 5, 6.**

WILLS.

1. **PAPER MAY BE REFERRED TO AND MADE PART OF A WILL**, if such paper is then in existence, and is so referred to in the will that it is capable of being identified from inspection, or by the aid of parol or other evidence. *In re Shillaber*, 433.
2. **PAPER REFERRED TO IN A WILL, BUT NOT IN EXISTENCE UNTIL AFTER THE WILL IS EXECUTED**, may not be admitted to probate as a part thereof. Hence, if a will bequeaths property to the executor to be disposed of as directed in a letter to him from the testator of the same date, and such letter is written and signed after the will is executed, though on the same day, it cannot be admitted to probate as a part thereof. *Id.*
3. **WILL CANNOT BE DENIED PROBATE BECAUSE IT REFERS TO ANOTHER PAPER** as a part thereof, which cannot be admitted to probate, nor because bequests therein are void for uncertainty. *Id.*
4. **WILL OF MARRIED WOMAN IS NOT REVOKED BY HER SUBSEQUENT MARRIAGE**, where the statute secures to her the absolute right to dispose of her property during coverture; and there being no other issue than the

children of a former marriage, her estate is given by said will to them. Whether such marriage would revoke a former will in favor of a stranger was undetermined. *Ward's Will*, 174.

5. **ELECTION TO TAKE UNDER WILL.** — The Kansas statute in relation to probating wills, and the election of the widow to take thereunder, specifically points out the course to be pursued when she has not consented in writing to the will, and a substantial compliance therewith is necessary to make such election binding. *James v. Dunstan*, 741.
6. **LAW OF PLACE WHERE LAND LIES, IN CASE OF A DEVISE, OR LAW OF TESTATOR'S DOMICILE AT TIME OF HIS DECEASE, IN CASE OF A BEQUEST,** GOVERNS respectively the validity of such devise or bequest. This includes not only the form and mode of execution of the will, but also the construction and interpretation of the will and the power and authority of the testator to make disposition of his estate. *Ford v. Ford*, 117.
7. **SCHEDULES REFERRED TO IN WILL AND ATTACHED THERETO** should be construed with the will as one instrument, together constituting the will of the testator. *Id.*
8. **DOCTRINE OF EQUITABLE CONVERSION CANNOT BE EXTENDED TO LANDS** of the testator situate in another state, when they are nowhere mentioned or referred to in the will, and it does not by implication disclose an intent to convert them. *Id.*
9. **DOCTRINE OF EQUITABLE CONVERSION BY WILL DOES NOT OPERATE AS TO LANDS** which, although described in a will, are directed to be converted into other lands in the same city, and a mere discretionary authority is given to convert, unless perhaps an actual conversion should in fact occur. *Id.*
10. **DOCTRINE OF EQUITABLE CONVERSION BY WILL IS APPLICABLE TO PERSONAL ESTATE** directed to be converted "as soon as practicable" after testator's death into lands in another state, or "for improving properties" therein, since the discretion as to time does not render the doctrine inoperative. *Id.*
11. **DOCTRINE OF EQUITABLE CONVERSION BY WILL IS APPLICABLE WHERE LAND** is directed to be converted "at schedule prices" into property in another state, there being no negative words indicating an intent on the testator's part not to have such lands sold at a less price. *Id.*
12. **SUCH DOCTRINE IS NOT OPERATIVE WHERE LAND** is directed to be converted into real estate in another state, where such conversion is dependent upon two such uncertain events as the termination of a life estate in such land, and the sale even then at a price specified in the will. *Id.*
13. **TERM "HOMESTEAD" MANIFESTLY MEANS,** when used in a testator's will, the house and all the grounds in which he lived, and is not restricted to the one fourth of an acre mentioned in the statute. *Id.*
14. **CONSTRUCTION OF WILL — TRUST ESTATE — EXECUTOR.** — Where there are directions in a will regarding the conversion, holding, and managing of an estate for the beneficial interest of several persons living, and to be born, as indicated, and the executor is alone named in the will, such executor takes a legal title to the whole estate in trust for the purpose mentioned. The several directions in the will are addressed to him and his successors in office, whether by ancillary administration or otherwise. He and they are to execute the will so far as the law will permit; and, subject to such segregations as the construction of the will demands, are to hold and

manage the *corpus* of the estate until the residuum by the terms of the will finally passes out of their hands; nor may he or they pervert or alienate the estate in contravention of the trust. *Id.*

15. **RESIDUUM OF ESTATE.** — Where a will provides that a certain definite portion of the net annual income of an estate shall be paid to certain beneficiaries, among whom was the widow, and she relinquishes her rights to her portion of such income, the share of the others is not thereby increased; and the question whether the accumulation of such undisposed of share into the residuum of the estate would or would not be valid, was not determined, since such income would arise from lands in another state. *Id.*
16. **ESTATE, WHEN SEGREGATED.** — Where, from time to time, under the provisions of a will, portions of the *corpus* of the estate were to vest in fee in the son, from the moment he becomes the owner of such fee that portion becomes segregated from the estate and relieved from every provision of the will, especially from that part of it relating to the paying out to beneficiaries of the net annual income of the estate; and so much of the estate as the widow elects to take in lieu of the provision made her in the will becomes segregated in like manner. *Id.*
17. **ID.** — Where a bequest is made of a specific sum of money, to take effect upon the happening of a certain contingency, — as the death of the testator's son before a certain age, leaving heirs, — if such event happens, such sum should be at once regarded as segregated from the estate, and held in trust for said heirs until such time as they can take absolutely under said will, notwithstanding the will in other parts directs the payment of all the net annual income of the estate to certain beneficiaries named therein. *Id.*
18. **CONSTRUCTION OF WILL — TRUST — VESTED INTEREST.** — Where a will directed the conversion of most of the testator's lands, situate in different states, into lands in Kansas City, and also directed the conversion of the "homestead," in case the widow should not desire to reside thereon, into land in said city, the executor, as trustee, takes a future vested estate in the "homestead," and as to the other property he takes a present vested estate. *Id.*
19. **ID. — WHERE THE TESTATOR'S SON,** when he reached forty years of age, was to have what was remaining of the whole estate after the payment of certain bequests, and the determination of the widow's interest therein, or in case he became the sole surviving legatee, and should die before he became vested with said estate, then the same was to be given to Hamilton College, which latter was also, upon the happening of other uncertain events, to come into the remainder of the estate, — in such case, neither of said parties take anything more than a contingent interest therein, under the Wisconsin statutes. *Id.*
20. **PERPETUITIES — SUSPENSION OF POWER OF ALIENATION.** — An attempt in a will to create a future estate in land, whereby the same is liable to be tied up from thirty to forty-eight years after the testator's death, constitutes, under the Wisconsin statute, such an unlawful suspension of the power of alienation as to make such disposition void. Such land, therefore, descends to the heirs, subject to the widow's rights therein. *Id.*
21. **ID. — THE RULE IS UNIVERSAL, THAT A SUSPENSION OF THE POWER OF ALIENATION** must necessarily terminate, under any and all circumstances, within the period prescribed by the statute, or the disposition will be void. *Id.*

- 22. PROPERTY IN OTHER STATES.** — As to the application of the doctrine of equitable conversion to lands and property situate in other states, the courts of Wisconsin have no jurisdiction to determine the title to such lands, nor the legality of accumulations of rents and profits therefrom. It would seem that the validity of such conversion, or of the suspension of the power of alienation, would be determinable by the law of the state where the property converted is situate. *Id.*

WITNESSES.

1. **CONCLUSION OF WITNESS.** — The testimony of a witness that he knew the meaning of an order to "work" a train between two stations named, but not stating what that meaning was, is not open to the objection that it states the conclusion of the witness. *International etc. R. R. Co. v. Telephone Co.*, 45.
2. **WITNESS CANNOT BE COMPELLED TO ANSWER ANY QUESTION** the answer to which would tend to criminate him; but this privilege does not extend to an answer the tendency of which is merely to humiliate and degrade the witness. And if the prosecution for the offense is barred by the statute of limitations, the reason of the privilege ceases, and the witness should be compelled to answer. *Ex parte Boscowitz*, 384.
3. **ON TRIAL OF FEMALE CHARGED WITH BEING COMMON PROSTITUTE**, witness has privilege of refusing to answer whether he has had sexual intercourse with the accused, on the ground that his answer would constitute an essential link in the chain of testimony sufficient to convict him of a criminal offense. *Id.*
4. **WITNESS MAY NOT BE ASKED ON CROSS-EXAMINATION** a question which does not tend to rebut, impeach, modify, or explain any of his testimony. *Atchison etc. R'y Co. v. Gants*, 780.
5. **PRACTICE — MOTION TO STRIKE OUT ANSWER OF WITNESS.** — When an improper answer is given to a legitimate question, or where a part of the answer is improper, the party complaining must move to strike out the answer, or the improper part, or it will not be reviewed. *Reiley v. Hayes*, 737.
6. **WITNESS, IMPEACHMENT OF.** — Before a party can impeach his own witness, under the Texas statute, some statement must have been made by such witness injurious to the cause he was called to testify in behalf of. It is not sufficient that the witness makes a statement different from what the party calling him had reason to believe, and did believe, he would make, if the statement made is not injurious. *Bennett v. State*, 875.
7. **WITNESS, IMPEACHMENT OF — SURPRISE.** — A party *bona fide* surprised at unexpected testimony of his witness may ask the witness as to his previous declarations alleged to have been made by him inconsistent with his testimony, with an object to probe his recollection, and lead him, if mistaken, to review what he has said, or to explain the attitude of the party calling the witness. But when the sole object is to discredit the witness, such testimony will not be received. *Id.*
8. **PARDONED WITNESS — COMPETENCY — CREDIBILITY.** — Party who has been convicted of a felony, and afterwards fully and legally pardoned, is a competent witness, but the record of his conviction may be put in evidence against him as affecting his credibility, and counsel has the right to comment upon his credibility when addressing the jury. *Id.*
9. **EVIDENCE.** — **PRIOR STATEMENTS MADE BY A WITNESS MAY BE RECEIVED IN EVIDENCE** when the adverse party has sought to impeach him by
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showing that he was testifying under some motive, and that his account is a fabrication of a late date, if such prior statements were made before the motive imputed to him could have existed. *Barkly v. Copeland*, 413.

10. RECEIVING EVIDENCE IN SUPPORT OF WITNESS BEFORE ANY IS OFFERED TO IMPEACH HIM will not justify the granting of a new trial, if evidence is subsequently offered and received for the purpose of such impeachment. *Id.*

See EMINENT DOMAIN.

WRIT OF ASSISTANCE

1. WRIT OF ASSISTANCE TO PUT EXECUTION PURCHASER in possession will only issue when the rights of the parties affected have been fully determined by judgment. The exercise of the power rests in the sound discretion of the court, and it will not be exercised in cases of doubt, nor under color of its exercise will title be tried or decided. *Stanley v. Sullivan*, 245.
2. WRIT OF ASSISTANCE TO PUT EXECUTION PURCHASER in possession provided by the Wisconsin Revised Statutes, section 3025, will not issue when there is a contest as to the right of the execution purchaser to the possession of the land sold, as where the defendant sets up a *bona fide* claim of a homestead exemption in the land sold. *Id.*
3. WRIT OF ASSISTANCE, PROVIDED by section 3025 of the Revised Statutes of Wisconsin, will not issue to aid an execution purchaser of an exempted homestead as against the owner thereof in possession at the time of the sale and application for the writ. *Id.*
4. WRIT OF ASSISTANCE, PROVIDED by section 3025 of the Revised Statutes of Wisconsin, will only be issued when the applicant shows that at the time judgment was docketed the execution defendant had an interest in the land upon which the judgment became a lien, and that he or some one claiming under him by title subsequently acquired is in possession, and refuses to surrender to the purchaser. *Id.*
5. WRIT OF ASSISTANCE. — JUDGMENT IN ACTION FOR DIVORCE, that plaintiff recover a certain sum of money, but not specifying that it is for alimony or in lieu of alimony, or that it shall be a lien upon defendant's real or personal property, is a mere money judgment, under which execution cannot be levied upon defendant's homestead, nor, in such case, will the writ of assistance, provided by section 3025 of the Revised Statutes of Wisconsin, issue to put the purchaser in possession. *Id.*





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